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René Provost

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*René Provost Ad.E.
Professor of Law
McGill University*

TRIALWATCH FAIRNESS REPORT
A CLOONEY FOUNDATION **FOR** JUSTICE INITIATIVE

ABOUT THE AUTHORS

René Provost is Professor of Law at McGill University, where he was the founding Director of the Centre for Human Rights and Legal Pluralism. He teaches and conducts research in public international law, international human rights law, international humanitarian law, legal theory and legal anthropology. Professor Provost previously served as President of the Société québécoise de droit international and was awarded the Barreau du Québec's Advocatus Emeritus (Ad. E.) distinction in 2017. A Fellow of the Royal Society of Canada, Professor Provost has acted as amicus curiae in a number of cases before the European Court of Human Rights and the Inter-American Court of Human Rights.

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ABOUT THE CLOONEY FOUNDATION FOR JUSTICE'S TRIALWATCH INITIATIVE

The **Clooney Foundation for Justice's TrialWatch initiative** monitors and grades the fairness of trials of vulnerable people around the world, including journalists, women and girls, religious minorities, LGBTQ persons and human rights defenders. Using this data, TrialWatch advocates for victims and is developing a Global Justice Ranking measuring national courts' compliance with international human rights standards.

The legal assessment and conclusions expressed in this report are those of the author and not necessarily those of the Clooney Foundation for Justice.

EXECUTIVE SUMMARY



René Provost, member of the TrialWatch Expert panel, assigned this trial a grade of C:

Based on the facts disclosed in the court record and in the trial monitors' notes, there was no reasonable factual basis, under Turkish law, for the indictment of Ahmet Tuna Altinel for membership in a terrorist organization or for terrorist propaganda. As such, his arrest and pre-trial detention amounted to a clear violation of his right to liberty protected by the Turkish Constitution and under the International Covenant on Civil and Political Rights and the European Convention on Human Rights. Mr. Altinel's right to be presumed innocent was compromised by a prejudicial statement from the Governor of Balıkesir Province in which his guilt was given as a verified fact.

The facts disclosed during the proceedings further demonstrate that the proceedings amounted to an abuse of the legal process aiming to prevent Mr. Altinel from expressing views critical of the Turkish Government. While Mr. Altinel was eventually acquitted by the court, preventing further violation of Mr. Altinel's right to liberty, this fact does not mitigate the seriousness of the assault on the rule of law represented by abusive prosecutions of this type, which, in this case, constituted a violation of Article 18 of the European Convention on Human Rights.

Because the TrialWatch monitors' notes and the available record show that the trial indisputably did not meet international standards, this trial received a grade of "C" under the methodology set forth in the Annex to this Report.

Ahmet Tuna Altinel is a Professor of Mathematics at the University of Lyon-1 in France. During a visit to Turkey, his passport was seized. When he inquired as to its whereabouts, he was arrested on suspicion of "propaganda for a terrorist organization,"¹ soon thereafter charged with "membership in a terrorist organization," and detained for nearly three months. The predicate for this charge was social media posts inviting attendance at an event in France entitled "Cizre—the Story of a Massacre" and interpretation assistance Mr. Altinel provided at the event. After his eventual release from pre-trial detention, the prosecution again reclassified the charge to "propaganda for a terrorist organization"—a set of changes defense counsel asserted had been in order to render Mr. Altinel's pre-

¹ SEGBIS Record Transcription Report, July 30, 2019 ("[M]y passport was seized without explanation the last time I entered the country on April 12, 2019 Finally, I came to Balıkesir myself. . . . Then, they used a cheap trick and called me to the Governor's Office, and I was taken into custody.").

trial detention more likely (since “membership in a terrorist organization” carries a presumption of pre-trial detention).²

The pre-trial process was marred by numerous violations of Mr. Altinel’s rights.³ First, the Turkish authorities violated Mr. Altinel’s right to liberty by ordering his detention prior to trial despite a lack of evidence that he had committed the crime charged. Further, the charges against him were based on protected expression, and thus his detention was arbitrary.

Second, the Governor of Balıkesir stated, prior to trial, that “it was determined” that Mr. Altinel had “organized an event for the PKK/KCK armed terrorist organization.” This violated Mr. Altinel’s right to be presumed innocent by assuming facts that were to be proven at trial.

Further, while the trial itself generally comported with international standards, the facts show that there was no lawful basis for the decision by the Turkish authorities to prosecute the case, given that the conduct charged was protected by the right to freedom of expression. This Report therefore concludes that the prosecution was pursued in bad faith, in violation of Article 18 of the European Convention on Human Rights.

² Detention Appeal Brief at p. 6 (“Even though the evidence did not change, the nature and characteristics of the crime were altered and the alleged crime was changed to “Being a Member of an Armed Organization,” . . . and this was probably because the elements of the crime of propaganda . . . were not present and there was nothing in the file that would require an arrest ruling. There is no other explanation for the fact that my client was two days later charged with ‘being a member of an organization’ even though there was no change in the evidence.”).

³ All opinions expressed in this Report are based upon the evidence discussed and cited in the Report, and are not based on facts not presented herein.

BACKGROUND INFORMATION



A. POLITICAL AND LEGAL CONTEXT

This trial took place against a backdrop of “severe restrictions on freedom of expression [and] the press . . . and unjustified arrests or criminal prosecution of journalists and others for criticizing government policies or officials.”⁴ In particular, human rights organizations have repeatedly expressed concern over the deteriorating human rights situation in Turkey, citing (among other concerns) the crackdown on criticism.⁵

After an attempted military coup on July 15, 2016, President Erdoğan imposed a state of emergency. Amnesty International reports that the state of emergency, which remained in force for two years, “paved the way for unlawful restrictions on human rights and allowed the government to pass laws beyond the effective scrutiny of Parliament and the courts.”⁶ Under the state of emergency, more than 110,000 public officials were dismissed or suspended without due process, while media outlets, private hospitals, foundations, and educational institutions were shut down by decree and had their assets confiscated without compensation.⁷ Over 50,000 people were arrested and remanded to pre-trial detention on terrorism charges, with most accused of being connected to membership in the “Fethullahist Terrorist Organization” (FETÖ), an organization the government blamed for the coup attempt.⁸ The government used “vaguely worded terrorism laws” as justification for these arrests.⁹

Throughout the state of emergency, and even after it was lifted in 2018, Turkey has sought to suppress critical voices. For instance, in 2019, while the Committee to Protect Journalists found that Turkey was—for the first time in four years—not the world’s leading jailer of journalists, it explained that this was the result of “successful efforts by the government of President Recep Tayyip Erdoğan to stamp out independent reporting and criticism by closing down more than 100 news outlets and lodging terror-related charges against many of their staff.”¹⁰ Even so, the International Press Institute (IPI) continues to

⁴ U.S. State Department, Country Human Rights Practices Report: Turkey 2019, pg. 2, *available at* <https://www.state.gov/wp-content/uploads/2020/03/TURKEY-2019-HUMAN-RIGHTS-REPORT.pdf>.

⁵ See, e.g., Freedom House, Freedom in the World 2019: Turkey (2019), *available at* <https://freedomhouse.org/country/turkey/freedom-world/2019> (“The erosion of civil liberties continued apace during the year, with frequent arrests and convictions of journalists and social media users who were critical of the government.”).

⁶ Amnesty International, Turkey 2017/2018 (2018), *available at* <https://www.refworld.org/docid/5a9938470.html>

⁷ Human Rights Watch, Turkey: Events of 2017, *available at* <https://www.hrw.org/world-report/2018/country-chapters/turkey>.

⁸ *Id.*

⁹ Freedom House, Freedom in the World 2018: Turkey (2018), *available at* <https://freedomhouse.org/country/turkey/freedom-world/2018> (describing arrest of more than 60,000 on terrorism charges).

¹⁰ Committee to Protect Journalists, China, Turkey, Saudi Arabia, Egypt Are World's Worst Jailers of Journalists, Dec. 11, 2019, *available at* <https://cpj.org/reports/2019/12/journalists-jailed-china-turkey-saudi-arabia-egypt.php>.

document significant numbers of journalists in prison.¹¹ Likewise, the Turkish government has blocked media outlets and websites. According to PEN International, media that is not supportive of the government “face regular legal harassment that drains finances through fines, legal fees and trumped-up tax penalties.”¹² Likewise, according to Twitter’s biannual transparency report, Turkey submitted 6,073 content removal requests between January and June 2019, the most of any country in the world.¹³

But it is not just journalists whose voices have been suppressed: Academics have also been prosecuted. A notable example has been the prosecutions of the ‘Academics for Peace.’ In 2016, 1,128 academics signed a petition calling for peace and condemning the Turkish government’s actions in southeastern Turkey.¹⁴ According to freedom of expression organization ARTICLE 19, “[n]othing in the petition can be understood as likely to incite violence or terrorism.”¹⁵ Despite this, a significant number of them were prosecuted, with some receiving jail sentences.¹⁶ Ultimately, a July 2019 Turkish Constitutional Court decision clarified that the petition was protected speech and the jail sentences violated their rights.¹⁷

Among the legal tools used by the government to stifle criticism are the two charges at issue in this case—membership in a terrorist organization and terrorist propaganda. Indeed, ARTICLE 19 and the Turkey Human Rights Litigation Support Project (TLSP) have recently explained that “[t]he number of human rights defenders, journalists, politicians, academics, lawyers and others who are critical of the government’s conduct and therefore charged with ‘aiding’ or being ‘a member of’ a terrorist organisation has reached an alarming level. In many cases, charges are based on opinions deemed to be even loosely aligned with a proscribed organisation’s stance or to lend support to its cause.”¹⁸

Article 7 of the Anti-Terror Law, Law No. 3713 of 1991, which criminalizes “[a]ny person who disseminates propaganda in favour of a terrorist organisation by justifying, praising

¹¹ Free Turkey Journalists, home page, *available at* <https://freeturkeyjournalists.ipi.media/> (accessed Feb. 14, 2019).

¹² PEN International, I Subscribe Campaign, *available at* <https://pen-international.org/print/6615>.

¹³ Twitter, Transparency Report: Removal Requests (January to June 2019), <https://transparency.twitter.com/en/countries/tr.html>.

¹⁴ Scholars at Risk Network, Peace Petition Scholars, Turkey, *available at* <https://www.scholarsatrisk.org/actions/academics-for-peace-turkey/>.

¹⁵ ARTICLE 19, Turkey: Academics for Peace Trials Violate Free Expression, Dec. 7, 2017, *available at* <https://www.article19.org/resources/turkey-academics-peace-trials-violate-free-expression/>.

¹⁶ Human Rights Watch, Turkey: Academics on Trial for Signing Petition, Dec. 5, 2017, *available at* <https://www.hrw.org/news/2017/12/05/turkey-academics-trial-signing-petition>.

¹⁷ Ali Kucukgocmen, Turkish Court Rules Academics’ Rights Violated in Kurdish Letter Case: Anadolu, July 26, 2019, *available at* <https://www.reuters.com/article/us-turkey-security-academics/turkish-court-rules-academics-rights-violated-in-kurdish-letter-case-anadolu-idUSKCN1UL22J>.

¹⁸ Secretariat of the Committee of Ministers, ARTICLE 19 and the Turkey Human Rights Litigation Support Project (TLSP), Communication in Accordance with Rule 9.2 of the Rules of the Committee of Ministers Regarding the Supervision of the Execution of Judgments and of Terms of Friendly Settlements, *Işıkırık v. TURKEY*, Jan. 21, 2020, *available at* [https://hudoc.exec.coe.int/eng#{%22EXECIdentifier%22:\[%22DH-DD\(2020\)82E%22\]}](https://hudoc.exec.coe.int/eng#{%22EXECIdentifier%22:[%22DH-DD(2020)82E%22]}).

or encouraging the use of methods constituting coercion, violence or threats,”¹⁹ has been the subject of significant criticism. For instance, Amnesty International has said that Article 7 is “vague and overly-broad, with no explicit requirement for propaganda to advocate violent criminal methods. It has been used repeatedly to prosecute the expression of non-violent opinions.”²⁰ ARTICLE 19 and the TLSP have likewise noted that Article 7 “fail[s] to define what amounts to ‘propaganda’ or ‘justifying’ ‘praising or ‘encouraging’ the use of terrorist methods. . . . Moreover, these articles fail to include the essential element of intent to incite violence.”²¹ The UN Special Rapporteur on Freedom of Expression in 2017 also expressed concern that the Anti-Terror Law “allows for subjective interpretation without adequate judicial oversight.”²² And the UN Human Rights Committee had earlier delivered a similar critique.²³

In 2019, Article 7 was again amended to include the following clarification: “Expression of opinions that do not overstep the boundaries of giving news or that have the aim of criticism does not constitute a crime.”²⁴ But ARTICLE 19 and TLSP note that “the wording is still far too broad and fails to define what the ‘limits of reporting’ are. Moreover, it also fails to address the issue of intent.”²⁵

With respect to the courtroom, there have also been significant concerns regarding the fairness of trials and the independence of the judiciary. For instance, the Media Law Studies Association (“MLSA”), a prominent organization in Turkey focusing on the Turkish government’s crackdown on journalists, and IPI released a report in January 2019 based on observations from 71 trials attended between June 1 and December 31, 2018.²⁶ The study indicated that “Turkish courts rely on detention measures excessively in freedom of speech trials [and] detainees are often not brought to court,” in violation of international

¹⁹ See Secretariat of the Committee of Ministers, Communication from NGOs (ARTICLE 19 and Turkey Human Rights Litigation Support Project (TLSP)) in the ONER AND TURK Group of Cases v. Turkey, Feb. 4, 2020 (discussing recent amendments) (hereinafter ARTICLE 19 & TLSP Communication on Oner and Turk), *available at* [https://hudoc.exec.coe.int/eng#%7B%22EXECIdentifier%22:%5B%22DH-DD\(2020\)102E%22%5D%7D](https://hudoc.exec.coe.int/eng#%7B%22EXECIdentifier%22:%5B%22DH-DD(2020)102E%22%5D%7D). Law No. 3713 (1991) (law prior to recent amendments), *available at* <https://www.legislationline.org/topics/country/50/topic/5>.

²⁰ Amnesty International, Turkey: First Academic to Go to Prison for Signing Peace Petition in a Flagrant Breach of Freedom of Expression, Apr. 30, 2019, *available at* <https://www.amnesty.org/download/Documents/EUR4402902019ENGLISH.pdf>.

²¹ See ARTICLE 19 & TLSP Communication on Oner and Turk, *supra*.

²² Report of the UN Special Rapporteur on Freedom of Expression on his Mission to Turkey, UN Doc. A/HRC/35/22/Add.3, June 21, 2017, para. 17.

²³ Human Rights Committee, Concluding Observations on the Initial Report of Turkey, CCPR/C/TUR/CO/1, para. 16.

²⁴ Kerem Altıparmak, Will Judges Explain to Journalists What News Is?, Bianet, Sept. 26, 2019, *available at* <https://bianet.org/english/law/213570-will-judges-explain-to-journalists-what-news-is>.

²⁵ See ARTICLE 19 & TLSP Communication on Oner and Turk, *supra*.

²⁶ MLSA, Justice Monitoring Report: Freedom of Expression Trials in Turkey, Jan. 2019, *available at* <https://www.mlsturkey.com/wp-content/uploads/2019/01/justice-monitoring-report.pdf>.

fair trial standards.²⁷ The study likewise found that the courts failed to respect rights at trial.²⁸

Likewise, the Council of Europe Commissioner for Human Rights has stated that “the independence of the [] judiciary has been seriously eroded”²⁹ and the most recent U.S. State Department report on Turkey’s human rights practices explained that “[t]he courts in some cases applied the law unevenly, with legal critics and rights activists asserting court and prosecutor decisions were sometimes subject to executive interference”³⁰— a concern amplified by recent amendments that give the Executive significantly greater control of the judiciary.³¹

B. THE CASE: TURKEY V. ALTINEL

Ahmet Tuna Altinel was among the numerous academics charged with terrorist propaganda in connection with the ‘Academics for Peace’ cases, a charge of which he was acquitted on September 16, 2019 further to a trial that is not directly linked to the focus of this report.³²

The charges in this case relate to Mr. Altinel’s promotion of an event in France on February 21, 2019 entitled “Cizre—the Story of a Massacre,” at which Faysal Sariyıldız, an exiled representative of the Peoples’ Democratic Party (HDP), spoke.³³ Mr. Altinel also translated for Mr. Sariyıldız at the event.³⁴ The event was organized by the Kurdish Society of Lyon and Rhone-Alpes (Amities Kurdes Lyon et Rhone-Alpes), an organization registered under French law.³⁵

²⁷ MLSA, Detention Procedures of Turkish Courts Violate Fair Trial Rights, Jan. 22, 2019, *available at* <https://www.mlsaturkey.com/en/mlsas-justice-monitoring-report-detention-procedures-of-turkish-courts-violate-fair-trial-rights/>.

²⁸ MLSA, Justice Monitoring Report: Freedom of Expression Trials in Turkey, Jan. 2019, *available at* <https://www.mlsaturkey.com/wp-content/uploads/2019/01/justice-monitoring-report.pdf>.

²⁹ Council of Europe, Country Visit: Turkey, July 8, 2019, *available at* <https://www.coe.int/en/web/commissioner/-/turkey-needs-to-put-an-end-to-arbitrariness-in-the-judiciary-and-to-protect-human-rights-defenders>.

³⁰ U.S. State Department, Country Human Rights Practices Report: Turkey 2019, pg. 10, *available at* <https://www.state.gov/wp-content/uploads/2020/03/TURKEY-2019-HUMAN-RIGHTS-REPORT.pdf>.

³¹ See International Commission of Jurists, Justice Suspended: Access to Justice and the State of Emergency in Turkey, Dec. 2018, pg. 17, *available at* <https://www.icj.org/wp-content/uploads/2018/12/Turkey-Access-to-justice-Publications-Reports-2018-ENG.pdf>.

³² OMCT, Turkey: Continuing Judicial Harassment and Obstacle to Freedom of Movement of Mr. Tuna Altinel, Dec. 9, 2019, *available at* <https://www.omct.org/human-rights-defenders/urgent-interventions/turkey/2019/12/d25630/>.

³³ The HDP “receives significant support from Turkey’s Kurdish population and . . . opponents accuse [it] of being aligned with the PKK [the Kurdistan Workers Union, a designated terrorist organization].” See, e.g., Scholars at Risk Network, *available at* <https://www.scholarsatrisk.org/report/2019-05-11-university-of-lyon-1/>.

³⁴ *Id.*; see also Indictment at p. 3 (alleging that Altinel “simultaneously translated the speech of Faysal SARIYILDIZ”).

³⁵ Bianet, Academic for Peace Tuna Altinel Released, July 30, 2019, *available at* <http://bianet.org/english/law/211078-academic-for-peace-tuna-altinel-released>.

Cizre is a town in Southeast Turkey. Human Rights Watch has reported that a “review[] [of] lists of the dead compiled by Cizre-based lawyers . . . show that as many as 66 Cizre residents, including 11 children, were killed by gunfire or mortar explosions during security operations between December 14 and February 11, 2016” and that “[t]he available information also indicates that security forces surrounded three buildings and deliberately and unjustifiably killed about 130 people – among whom were unarmed civilians and injured combatants – trapped in the basements.”³⁶

According to Mr. Altinel, the objective of the event in Lyon was to “have a witness-based discussion and conduct a memory study to raise awareness and sensitivity” of what he characterized as “murder[] by security forces in the chaotic environment Turkey was dragged into.”³⁷ According to the indictment, by contrast, “unsubstantiated claims and accusations were directed against [Turkey] by Faysal SARIYILDIZ . . . ; . . . that during the operations carried out by [Turkish] security forces in Cizre in February 2016, certain war crimes were committed and the civilians had been massacred and that the western countries had remained silent against this massacre.”³⁸

Upon returning to Turkey to visit family, Mr. Altinel’s passport was seized; on May 10, 2019 when he inquired into its return, Mr. Altinel was arrested based on an order from the Balıkesir 1st Justice of Peace.³⁹

On May 11, 2019, after being interrogated, Mr. Altinel was arrested and detained on suspicion of propaganda for a terrorist organization.⁴⁰ Two days later, he was indicted on charges of being a member of an armed terrorist organization for his alleged support of the PKK/KCK. For evidence, the indictment principally relies on the contents of Mr. Altinel’s Facebook page and records of what transpired at the February 21 event. In particular, the indictment reproduces a Facebook post dated February 2, 2019, which invited participation at the February 21 event and characterized what had transpired in Cizre as “[t]ens of defenseless people were massacred, burned alive in three basements in the Cudi district.”⁴¹ The indictment goes on to allege:

[T]hat [Mr. Altinel] played an active role in organizing of a conference titled “Cizre – The Story of a Massacre,” publishing it on his social media account, sharing it and announcing it together with the foundation that is considered to act together with the terrorist organization PKK/KCK and that bears the phrase “kürdistan” on its emblem; that according to the footages from this event, he started a smear campaign against our State and security forces; that on the visuals prepared personally by the suspect, who

³⁶ Human Rights Watch, Turkey: State Blocks Probes of Southeast Killings, July 11, 2016, *available at* <https://www.hrw.org/news/2016/07/11/turkey-state-blocks-probes-southeast-killings>.

³⁷ SEGBIS Record Transcription Report, Jan. 24, 2020.

³⁸ Indictment at p. 3.

³⁹ *See supra* note 1; *see also* Detention Brief at pp. 1-2.

⁴⁰ Record of Statement and Interrogation.

⁴¹ Indictment at p. 10.

also acted as the host and the translator of the event, and on the visuals brought by Faysal SARIYLDIZ to be screened at the event, the image of the so-called “flag of kürdistan” is clearly visible.⁴²

The indictment also appears to suggest that the Kurdish Society of Lyon and Rhone-Alpes was somehow affiliated with the PKK.

The indictment reflects that when interrogated, Mr. Altinel denied any relationship to the PKK.⁴³ The indictment goes on to note that “even though the investigation about the suspect was initiated on the grounds of propaganda crime . . . the actions of the suspect that are examined in the case file are judged to fall under the crime of membership in a terrorist organization,”⁴⁴ apparently on the theory that “the suspect defends the aims and ideology of the terrorist organization of the PKK/KCK.”⁴⁵

C. PRE-TRIAL PROCEEDINGS

On May 11, 2019, the 1st Balıkesir Criminal Court of Peace ordered Mr. Altinel arrested (on the initial charge of propaganda for a terrorist organization⁴⁶) and detained “because there is strong suspicion of crime, the flight risk because the defendant lives abroad and the fact that judicial control would be insufficient based on the character and nature of the offense the suspect is charged with.”⁴⁷

The defense appealed this order to the 2d Balıkesir Criminal Court of Peace and then to the 3d Balıkesir Central Criminal Court. In particular, the defense argued that whether the charge was propaganda for a terrorist organization or membership in a terrorist organization, there was no reasonable suspicion that Mr. Altinel had committed the crime.⁴⁸ Further, the defense argued that the defendant did not pose a flight risk, because he had actually voluntarily presented himself in Balıkesir seeking return of his passport and had appeared in court in connection with the ‘Academics for Peace’ charges.⁴⁹

On June 25, the 3d Balıkesir Central Criminal Court denied the appeal, finding:

[T]here is strong suspicion of the crime the defendant is charged with, and that the alleged crime is among the crimes specified in Article 100 of the Code of Criminal Procedure and for which the grounds of arrest are recognized as presumption of law. It was concluded that the provisions of

⁴² *Id.* at p. 12.

⁴³ *Id.* At p. 11 (stating “that the PKK/KCK had no influence in the organization of this event; that the mentioned foundation had no affiliation with the PKK/KCK”).

⁴⁴ *Id.* at p. 11.

⁴⁵ *Id.* at p. 11.

⁴⁶ *Cf. id.* at p. 1 (defense counsel arguing that “my client’s purpose is not to engage in propaganda for a terrorist organization”).

⁴⁷ Record of Statement and Interrogation at p. 2.

⁴⁸ Detention Appeal Brief at pp. 5-6.

⁴⁹ *Id.* at p. 8 (noting also that without his passport, the defendant could not travel abroad).

judicial control would be inadequate. It was concluded that the arrest ruling was appropriate because it is assumed that the defendant poses a flight risk in this situation pursuant to the provisions of the law.⁵⁰

Mr. Altinel was thus held in pre-trial detention from the date of his arrest until the first hearing in his case on July 30, 2019, amounting to 81 days in detention.

July 30, 2019 Hearing

During this hearing, defense counsel argued that, in fact, the prosecution had charged Mr. Altinel with membership in a terrorist organization because a propaganda crime would not have provided sufficient basis to detain him.⁵¹

Defense counsel further argued that Mr. Altinel's right to be presumed innocent had been violated as a result of statements made by the Balıkesir Governor's office.⁵² Specifically, the Governor's office had issued a statement to the effect that "it was determined that an academician named Ahmet T. A. organized an event for the PKK/KCK armed terrorist organization and played the most visible role in it."⁵³

Mr. Altinel testified that the Kurdish Society of Lyon and Rhone-Alpes is "peaceful" and "has no particular political leaning."⁵⁴ He went on to assert that "there is not a single piece of concrete information . . . suggesting a connection between the PKK/KCK and the association of which I am a member."⁵⁵

Before the conclusion of the hearing, the prosecutor agreed that the defendant could be released from detention—and he was by the court.⁵⁶

D. TRIAL PROCEEDINGS

November 19, 2019 Hearing

On November 19, 2019, at the second hearing, judges with "authoritative jurisdiction" were present.⁵⁷ During the hearing, the prosecutor, providing his "opinion of the case," reclassified the offense from one of membership in a terrorist organization to terrorist propaganda under Article 7/2-2 of the Anti-Terror Law—focusing in particular on the

⁵⁰ Decision of the 3d Balıkesir Central Criminal Court at p. 1.

⁵¹ Trial Monitor's Notes, July 30, 2019.

⁵² *Id.*; see also SEGBIS Record Transcription Report, July 30, 2019.

⁵³ Balıkesir Governor Office, Press Release (1779) (May 11, 2019), available at <http://www.balikesir.gov.tr/basin-bulteni-1779>.

⁵⁴ SEGBIS Record Transcription Report, July 30, 2019.

⁵⁵ *Id.*

⁵⁶ Trial Monitor's Notes, July 30, 2019.

⁵⁷ Trial Monitor's Notes, Nov. 19, 2019. At the first hearing, only one of the assigned judges was present, with the rest of the bench comprised of duty judges.

advertisement for the February 21, 2019 event. The prosecutor asserted that “it was understood that the defendant shared posts that would legitimize the exalted actions and activities of the illegal PKK/KCK terrorist organization.”⁵⁸ The prosecutor admitted that other posts were protected by the right to freedom of expression.⁵⁹ By contrast, the prosecution argued that invitation to the event “glorifies and legitimizes the acts of PKK/KCK.”⁶⁰ The prosecutor requested that the court impose a sentence of 1 to 5 years of imprisonment for “terrorist propaganda.”⁶¹

In response, Mr. Altinel argued that the Facebook post concerned human rights violations that had taken place in Cizre and could not be considered criminal propaganda.⁶² In particular, he stated that “[i]t is a chain of facts, you have read, not propaganda.”⁶³

Further, defense counsel argued that the post was protected by the right to freedom of expression, in particular, pointing out that the defendant had recently been acquitted in a different case (‘Academics for Peace’) that involved “much harsher criticisms.”⁶⁴ Defense counsel also argued that the collection of evidence had failed to satisfy the requirements for collection of evidence in terrorism cases on foreign soil.⁶⁵ Nevertheless, defense counsel requested additional time to review the prosecutor’s “final legal opinion” and respond in writing.⁶⁶

Defense counsel also raised their concern about the authorities’ retention of Mr. Altinel’s passport. Although the court had not imposed travel restrictions on Mr. Altinel when he was released from detention on July 30, the authorities had declined to return his passport due to the pendency of the proceedings.⁶⁷ The Court asserted that the question of Mr. Altinel’s passport was an administrative issue and that concerns should be addressed to the administrative courts.⁶⁸

January 24, 2020 Hearing

At the third and final hearing, according to the official transcript, defense counsel noted to the court that four people had been excluded from the courtroom, although there appeared to be seating still available. Defense counsel requested that “a decision be made stating that there is no space in the room. Issue a decision.” The court, in turn, said

⁵⁸ Minutes of the Hearing, Nov. 19, 2019.

⁵⁹ Trial Monitor’s Notes, Nov. 19, 2019.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ SEGBIS Record Transcription Report, Nov. 19, 2019.

⁶⁴ *Id.*

⁶⁵ *Id.* (“I might have to ask if the Lyon Embassy has recorded and watched a meeting held by a French association in Lyon in accordance with French laws.”).

⁶⁶ *Id.*

⁶⁷ Trial Monitor’s Notes, Nov. 19, 2019.

⁶⁸ *Id.*

“Madam Counsel, there is no space. . . . We are not entering it into the record. We are starting the hearing.”⁶⁹

The prosecutor then reminded the court that the prosecution had sought to amend the charge⁷⁰ and maintained that based on the Facebook post regarding the event to discuss Cizre, the defendant’s conduct constituted the crime of propaganda for the terrorist organization PKK/KCK.⁷¹

Defense counsel, by contrast, argued that neither the elements of the membership charge nor of the propaganda charge were present. With respect to the former, defense counsel stated that “[o]ne of the required elements is having an organic connection with the organization, and the other is acts and activities that require continuity, diversity and intensity,”⁷² the latter of which the defense alleged was clearly lacking since an invitation did not meet this standard. Counsel went on to say that critical elements of the propaganda charge were also absent, notably that none of Mr. Altinel’s posts promote force or violence—in particular, that none of them met the ‘clear and present danger’ test.⁷³ He further pointed out that the events in Cizre had been widely discussed by credible international organizations.⁷⁴

Mr. Altinel was permitted to make a final statement, which he did, reiterating the argument he had made in November⁷⁵ and pointing out that the prosecution had never sought to explain how the invitation he had posted could possibly constitute terrorist propaganda.⁷⁶ He further noted that while proceedings were on-going, he had been acquitted in the ‘Academics for Peace’ case, to which the judges had sought to join his original prosecution for membership in a terrorist organization.⁷⁷

At the end of the hearing, the court acquitted the defendant of membership in a terrorist organization under Article 223/2-e of the Code of Criminal Procedure⁷⁸ without speaking to the propaganda charge.⁷⁹

⁶⁹ SEGBIS Record Transcription Report, Jan. 24, 2020.

⁷⁰ The court is not obliged to accept such a request according to the Turkish Code of Criminal Procedure, Article 226.

⁷¹ Minutes of the Hearing, Jan. 24, 2020.

⁷² SEGBIS Record Transcript Report, Jan. 24, 2020.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* (“I would like to repeat again now what I said at the hearing on November 19th.”).

⁷⁶ *Id.* (“It is so clearly unrelated [to terrorist propaganda] that there is not a single sentence in this legal opinion explaining why this invitation is considered under Anti-Terror Law 7/2.”).

⁷⁷ *Id.*

⁷⁸ See Minutes of the Hearing, Jan. 24, 2020 (“[W]hen the evidence collected for the file was evaluated as a whole, no indubitable and certain evidence, which may be considered enough to sentence the defendant, could be obtained.”). Article 223/2 describes various potential dispositions. Article 223/2-e is invoked where it has not been proven that the charged crime has been committed by the accused.

⁷⁹ *Id.*

In a subsequent written judgment, the court specifically found that the necessary elements of the crime of membership in a terrorist organization—namely, an organic connection with the organization and acts and activities with the requisite continuity, diversity and intensity—had not been shown.⁸⁰ It went on to find that “it is clear that [Mr. Altinel] has not shared any post that legitimizes the organizations recognized by our state as terrorist organizations or their actions,”⁸¹ formally acquitting the defendant of the propaganda charges.

⁸⁰ Turkey v. Ahmet Tuna Altinel, Case 2019/232, Reasoned Decision at p. 7.

⁸¹ *Id.* at p. 8.

METHODOLOGY



A. THE MONITORING PHASE

The Clooney Foundation for Justice deployed monitors to hearings in this case on July 30, 2019, November 19, 2019, and January 24, 2020 before the Balıkesir Serious Crimes Court (Major Felony Court) No. 2. The monitors were fluent in Turkish and able to understand the proceedings. CFJ also conducted background research regarding the case.

CFJ notified the court of the observation. The monitors did not experience any impediments in entering the courtroom, although at the first hearing the courtroom was filled over-capacity.⁸² The monitors used the CFJ TrialWatch App to record and track what transpired in court and the degree to which the defendant's fair trial rights were respected. The monitors' TrialWatch App responses and notes were shared with Professor René Provost, Professor of Law at McGill University and member of the TrialWatch Experts Panel responsible for evaluating the fairness of the trial.

B. THE ASSESSMENT PHASE

To evaluate the trial's fairness and arrive at a grade, TrialWatch Expert René Provost reviewed responses to the standardized questionnaire (collected via the CFJ TrialWatch App), court documents, and notes taken during the proceedings. Professor Provost found that the proceedings violated rights protected by the International Covenant on Civil and Political Rights (ICCPR) and European Convention on Human Rights (ECHR) including in particular that there had been (A) a violation of Mr. Altinel's right to liberty during his unjustified pre-trial detention; (B) the negation of his right to be presumed innocent and to be tried by an independent and impartial tribunal, due to the public statement by the Governor of Balıkesir; and (C) the abuse of prosecutorial discretion for ulterior purposes, more precisely to stifle free expression, given that there was no reasonable foundation to either of the charges directed at Mr. Altinel, in violation of Article 18 of the ECHR.

⁸² Trial Monitor's Notes, July 30, 2019.

ANALYSIS



A. APPLICABLE LAW

Mr. Altinel's ultimate acquittal with respect to the charges of terrorist propaganda and membership in a terrorist organisation represent a significant vindication of his fundamental human rights under Turkish and international human rights law. Based on the facts of the case, as recounted above, a conviction by a Turkish court on either ground would have amounted to a clear violation of several protected rights. That said, the proceedings as they unfolded nevertheless amounted to a number of important human rights violations under both Turkish constitutional law and international human rights law.

Fundamental rights are protected in Turkish law under Part II of the 1982 Constitution.⁸³ These rights are to be directly applied by all courts in Turkey and the courts have a duty to invoke the constitution *proprio motu* if they become aware of a violation. Turkey is also bound by customary and treaty human rights obligations under public international law. In particular, Turkey ratified the European Convention on Human Rights in 1954 and the International Covenant on Civil and Political Rights in 2003. Although the Turkish Government, on a number of occasions, has invoked a state of emergency to derogate from some of its obligations under the ECHR and ICCPR, no current derogation could justify suspension or limitation of guarantees under either treaty. Further to a 2004 amendment, Article 90 §5 of the Turkish Constitution provides for the direct application within domestic law of ratified international human rights treaties such as the ECHR and ICCPR. In case of a conflict between a binding human rights treaty and domestic law, Article 90 §5 provides that international law shall prevail.⁸⁴

B. PRE-TRIAL DEPRIVATION OF LIBERTY

The right to liberty is protected in Turkey under domestic law by Article 19 §1 of the Turkish Constitution and under international law by Article 9 of the ICCPR and Article 5 of the ECHR. Detention is an exceptional measure departing from the general rule of the right to liberty.⁸⁵ Based on the facts discussed in this Report, Mr. Altinel's pre-trial detention violated his right to liberty because (1) there was insufficient evidence that he had committed the crime charged; (2) the charge was predicated on lawful exercise of Mr. Altinel's right to freedom of expression; and (3) procedural safeguards were not respected.

⁸³ An unofficial English version is available at https://global.tbmm.gov.tr/docs/constitution_en.pdf.

⁸⁴ See: Ergun Özbudun & Füsün Türkmen, Impact of the ECtHR Rulings on Turkey's Democratization: An Evaluation, 35 Human Rights Quarterly 985 (2013); Levent Gonenc & Selin Esen, The Problem of the Application of Less Protective International Agreements in Domestic Legal Systems: Article 90 of the Turkish Constitution, 8 European Journal of Law Reform 485–500 (2006).

⁸⁵ European Court of Human Rights (ECtHR), *Iljiov v. Bulgaria*, Appl. No. 33977/96, ¶ 85 (2001).

First, Article 5(1)(c) of the ECHR exhaustively enumerates the strictly defined conditions governing pre-trial detention,⁸⁶ including that the application of this measure must be based on reasonable suspicion that a violation of domestic law has taken place. Under Turkish law, the detention measure can be applied only to “individuals against whom there is a strong indication of guilt.”⁸⁷ In numerous cases, the Turkish Constitutional Court has established that a ‘strong indication of guilt’ appears only in cases where the accusation is supported with convincing evidence.⁸⁸ The Constitutional Court of Turkey has made clear that this indication of guilt must exist—and be demonstrated in the reasoning of the detention order⁸⁹—at the point in time when the court considers detention.

For the European Court of Human Rights, reasonable suspicion refers to “the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence”⁹⁰; it is a threshold that “the suspicion must meet to satisfy an objective observer of the likelihood of the accusations.”⁹¹ Good faith in itself is inadequate to establish reasonable suspicion.⁹² The state must provide facts or information to meet the objective test of reasonableness. These relevant facts and information must reasonably correspond to the elements of an offence articulated in the relevant state’s Criminal Code.⁹³

Mr. Altinel was initially placed in pre-trial detention on account of a ‘strong suspicion’ that he had committed the crime of propaganda for a terrorist organization.⁹⁴ He was subsequently indicted on charges of membership in a terrorist organization within the meaning of Article 314(2) of the Turkish Criminal Code, an offence punishable by up to ten years of imprisonment. And the appeal court ultimately justified his detention on that ground.⁹⁵

But the Turkish Court of Cassation has established that, to be considered a member of a terrorist organization, the suspect must consent to be involved in the ‘hierarchical structure’ of the organization or have an ‘organic relationship’ with the organization; and

⁸⁶ *Id.*

⁸⁷ Turkish Constitutional Court (TCC), *Mehmet Hasan Altan*, Appl. No. 2016/23672 (2018); TCC, *İhsan Yalçın*, Appl. No. 2017/8171 (2020); TCC, *Mustafa Özterzi*, Appl. No. 2016/14597 (2019); TCC, *Mustafa Açıy*, Appl. No. 2016/66638 (2019) and *E.A.*, Appl. No. 2016/78293 (2019); TCC, *İlker Deniz Yücel*, Appl. No. 2017/16589 (2019); TCC, *Turhan Günay*, Appl. No. 2016/50972 (2018); TCC, *Şahin Alpay*, Appl. No. 2016/16092 (2018).

⁸⁸ TCC, *Turhan Günay*, Appl. No. 2016/50972 (2018); TCC, *Şahin Alpay*, Appl. No. 2016/16092 (2018); TCC, *Mehmet Hasan Altan*, Appl. No. 2016/23672 (2018). See also Article 100 of the Turkish Code of Criminal Procedure No. 5271 (“strong suspicion of a crime”).

⁸⁹ TCC, *Turhan Günay*, Appl. No. 2016/50972, § 72 (2018); TCC, *Şahin Alpay*, Appl. No. 2016/16092, § 76-77 (2018); TCC, *Halas Aslan*, Appl. No. 2014/4994, § 75 (2017); TCC, *Selçuk Özdemir*, Appl. No. 2016/49158, § 62- 67 (2017). See also Article 101 (1) and (2) of the Turkish Code of Criminal Procedure No. 5271.

⁹⁰ ECtHR, *Kavala v. Turkey*, Appl. No. 28749/18, ¶ 127 (2019).

⁹¹ *Id.* ¶ 128.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ Record of Statement and Interrogation.

⁹⁵ Decision on Appeal Against Arrest.

the acts of which they are accused must show ‘continuity, diversity and intensity.’ Accordingly, speech in itself is insufficient to establish membership.⁹⁶

Even for the crime of propaganda, Turkish law does not consider as an offence just any expression of thoughts concerning terrorism but only the act of disseminating the propaganda of terrorist organizations in a way that justifies, praises, or incites a recourse to, the use or threat to use force or violence.⁹⁷

In this case, the bill of indictment against Mr. Altinel compiles evidence irrelevant to the offence in question. In particular, the indictment relies on the contents of Mr. Altinel’s Facebook page and records of what transpired at the February 21 event to establish the offence. However, the facts imputed to Mr. Altinel are legal activities related to the exercise of his right to free speech protected under the ECHR and ICCPR. As to the relations between Mr. Altinel and the Kurdish Society of Lyon and Rhone-Alpes, that Society is a lawful organization that continues to conduct its activities freely in France. In any event, the indictment includes no evidence that the society is affiliated with or part of the PKK/KCK. Further, some evidence cited in the indictment simply sheds no light on which of Mr. Altinel’s activities were deemed criminal.

The above-mentioned facts are insufficient to give rise to a reasonable suspicion that Mr. Altinel consented to be involved in the hierarchical structure of the PKK/KCK, had an organic relationship with the organisation, or that his activities demonstrated continuity, diversity and intensity of acts of a kind sufficient to establish membership in a terrorist organization. Further, the facts relied upon in the indictment are related to the exercise of protected international and constitutional rights. The fact that such acts were included in the indictment as the elements of an offence in itself diminishes the reasonableness of the suspicion. Accordingly, it has not been demonstrated in a satisfactory manner that Mr. Altinel was deprived of his liberty on the basis of reasonable suspicion that he had committed a criminal offence.

In conclusion, there was a clear violation of Article 5(1) of the ECHR and Article 19 §3 of the Turkish Constitution on account of the lack of reasonable suspicion that Mr. Altinel had committed an offence.

Second, the European Court has established that Article 5 protects individuals from arbitrary deprivation of liberty.⁹⁸ Even if a detention order depriving an individual of liberty conforms with domestic law, it may still be contrary to the ECHR.⁹⁹

⁹⁶ Turkish Court of Cassation, 16th Criminal Chamber, dated 30.04.2015, No. 2015/3344 E, 2015/926 K.

⁹⁷ See *supra* note 17 and accompanying text. TCC, *Ayşe Çelik*, App. No. 2017/36722 (2019).

⁹⁸ ECtHR, *Nakhmanovich v. Russia*, Appl. No. 55669/00, ¶¶ 70-71 (2006); ECtHR, *Stašaitis v. Lithuania*, Appl. No. 47679/99, ¶ 67 (2002).

⁹⁹ ECtHR, *Creangă v. Romania*, Appl. No. 29226/03, ¶ 84 (2012); ECtHR, *Kavala v. Turkey*, Appl. No. 28749/18, ¶ 132 (2019).

In this regard, arbitrariness may arise “where the order to detain and the execution of the detention do not genuinely conform with the purpose of the restrictions permitted” by Article 5(1); and “where there was no relationship of proportionality between the ground of detention relied upon and the detention in question.”¹⁰⁰ The weakness of the evidence of the alleged offence presented in the indictment renders Mr. Altinel’s detention arbitrary on this basis as well.

Third and finally, Article 5 of the ECHR also includes procedural and substantive safeguards to protect individuals from arbitrary deprivation of liberty. These include speedy judicial review of the detention order to effectively control the detention. The effectiveness of this review will be undermined by the passage of time.¹⁰¹

The ECtHR has established that the preliminary “automatic review of arrest and detention must be capable of examining lawfulness issues and whether or not there is a reasonable suspicion that the arrested person had committed an offence, in other words, that detention falls within the permitted exception set out in Article 5(1)(c).”¹⁰² The review of lawfulness must “establish whether the deprivation of the individual’s liberty is justified.”¹⁰³ This review must be able to detect “any ill-treatment and to keep to a minimum any unjustified interference with individual liberty.”¹⁰⁴

Mr. Altinel was placed in pre-trial detention on May 11, 2019 by the magistrate court on suspicion of making propaganda for a terrorist organization. The bill of indictment that was prepared two days after the court’s review reclassified the offence from making propaganda for a terrorist organization to the offence of membership in a terrorist organization. In a previous decision on Article 5(3), the ECtHR explained that in Turkey, *le juge de paix* (the magistrate court) is the competent legal authority to review the lawfulness of arrest and detention.¹⁰⁵ As the nature of the offence had been changed, a new review of detention was required by the magistrate court to examine whether or not there was reasonable suspicion that Mr. Altinel had committed the offence of being a member of a terrorist organization. As Article 5(3) places the competent legal authority under an obligation to provide a hearing to the individual brought before it prior to taking a decision on the appropriateness of detention, Mr. Altinel should have appeared before

¹⁰⁰ ECtHR, *James, Wells and Lee v. United Kingdom*, Appl. Nos. 25119/09, 57715/09, and 57877/09, ¶¶ 191-95 (2012).

¹⁰¹ ECtHR, *Kavala v. Turkey*, Appl. No. 28749/18, ¶ 177 (2019).

¹⁰² ECtHR, *McKay v. the United Kingdom*, Appl. No. 543/03, ¶ 40 (2006); ECtHR, *Oral and Atabay v. Turkey*, Appl. No. 39686/02, ¶ 41 (2009) 1.

¹⁰³ ECtHR, *Aquilina v. Malta*, Appl. No. 25642/94, ¶ 52 (1999).

¹⁰⁴ ECtHR, *McKay v. the United Kingdom*, Appl. No. 543/03, ¶ 33 (2006).

¹⁰⁵ ECtHR, *Oral and Atabay v. Turkey*, Appl. No. 39686/02, ¶ 48 (2009) (“La Cour observe qu’après l’amendement de l’article 128 du code de procédure pénale, le contrôle de la légalité d’une arrestation, de la garde à vue et de son éventuelle prolongation relèvent de la compétence du juge de paix qui statue sur dossier (paragraphe 21 ci-dessus).”).

the magistrate court for review of his detention under this new offence.¹⁰⁶ In particular, Article 174(1) of the Turkish Code of Criminal Procedure requires the court to return the bill of indictment to the public prosecutor's office if the indictment does not describe evidence to establish the elements constituting the crime of which the defendant is accused.¹⁰⁷

But instead, his detention on these new grounds was only assessed at the appellate level, and then only after weeks had passed.¹⁰⁸ In the absence of a timely review of the lawfulness of Mr Altinel's detention on the charge of being a member of a terrorist organization, the Turkish authorities violated Article 5(3) of the ECHR.

C. PRESUMPTION OF INNOCENCE

The presumption of innocence is one of the fundamental guarantees of a fair trial, protected by Article 6(2) of the ECHR and Article 14(2) of the ICCPR as well as under customary international human rights law. The right to be presumed innocent implies that the state must not behave in a manner that undermines the regular judicial process that must make a determination of the guilt or innocence of a person accused of having committed a crime. In particular, as developed in the case law of the European Court of Human Rights and the decisions of the UN Human Rights Committee, public officials must refrain from any prejudicial statement, whether oral or written, that suggests that the accused is guilty. In the case of Mr. Altinel, the press release issued by the Governor of the province of Balıkesir on May 11, 2019, one day after his arrest, violated his right to be presumed innocent.

Public officials, whether they be elected to a political office or attached to the police force, routinely make announcements to inform the public that someone has been arrested and charged with an offence. There is indeed a legitimate interest in keeping the public informed of ongoing criminal investigations. In order to avoid violating the right to the presumption of innocence of any accused, however, public officials must do so "with all the discretion and reserve necessary."¹⁰⁹ Any public statement by a representative of the state that proclaims or suggests the guilt of an accused prior to the final judgement of a court will breach the presumption of innocence. The European Court of Human Rights has insisted that the choice of words and the context in which they are issued and interpreted matter greatly to the determination of whether they go beyond indicating that

¹⁰⁶ ECtHR, *Schiesser v. Switzerland*, Appl. No. 32819/96, ¶ 31 (1979); ECtHR, *De Jong, Baljet and Van den Brink v. the Netherlands*, Appl. Nos. 8805/79, 8806/79, 9242/81, ¶ 51 (1982); ECtHR, *Nikolova v. Bulgaria*, Appl. No. 20688/04 ¶ 49 (2013); ECtHR, *Aquilina v. Malta*, Appl. No. 25642/94, ¶ 50 (1999).

¹⁰⁷ Turkish Code of Criminal Procedure, Article 170(4) and (5) & Article 174(1). A translation is available at

https://www.unodc.org/res/cld/document/tur/2005/turkish_criminal_procedure_code_html/2014_Criminal_Procedure_Code.pdf.

¹⁰⁸ Cf. ECtHR, *Mamedova v. Russia*, Appl. No. 7064/05, ¶ 96 (2006) (finding that three weeks was excessive in deciding on the lawfulness of the applicant's detention).

¹⁰⁹ ECtHR, *Allenet de Ribemont v. France*, Appl. No. 15175/89, ¶ 38 (1995).

a person has been accused to instead signal that they are guilty.¹¹⁰ Statements found in violation of the presumption of innocence have ranged from officials declaring that ‘they were sure’ that the accused had committed the crime to others that merely implied so.¹¹¹ For the European Court, “[i]t suffices, even in the absence of any formal findings, that there is some reasoning to suggest that the official regards the accused as guilty.”¹¹² Such statements can be taken as encouraging the public to believe that the accused are guilty and as interfering with the unbiased assessment of fact by the competent tribunal.¹¹³ There is no need to prove that the court in fact presumed them to be guilty in a later trial.¹¹⁴ The fact that the accused were later acquitted does not negate the possibility that the presumption of innocence was violated.

In the present case, the governor of the province of Balıkesir issued a press release after Mr. Altinel was arrested, but prior to any judicial determination of the soundness of the charges against him. In that document, it was stated that “[i]n the effort to uncover and prevent activities of the PKK/KCK Armed Terrorist Organization, it was determined that an academic named Ahmet T. A. organized an event for the PKK/KCK armed terrorist organization” and that “this individual had also shared posts related to the conference in question and posts that contained terrorist organization propaganda.” Missing from this statement are key qualifiers to indicate to the public that Mr. Altinel was merely suspected of these crimes, and that they remained to be proven in a court of law. The press release here is similar to the one issued by authorities in *Y.B. and others v. Turkey*. In that case, four individuals were described in a press release as “members of the illegal organization having participated in the arson of a municipal bus and in [illegal] (sic) demonstrations,” facts that “had been established.”¹¹⁵ Although the names of the accused were not mentioned in the statement, they rapidly became public knowledge as a result of the press release. The European Court of Human Rights concluded that this violated the accused’s presumption of innocence.¹¹⁶ In the present case, the statement of the governor of Balıkesir presented as averred facts (“it was determined”) that Mr. Altinel had organised an event for a terrorist group and had disseminated terrorist propaganda, facts that had never been shown to be true in a court of law. The fact that he was later acquitted of these charges only highlights the damaging nature of such a statement. This amounts to a clear

¹¹⁰ ECtHR, *Ismoilov v. Russia*, Appl. No. 2947/06, ¶ 166 (2008); ECtHR, *Y.B. v Turkey*, Appl. Nos. 48173/99 & 48319/99 (2005).

¹¹¹ Human Rights Committee, *Gridin v. Russia*, U.N. Doc. CCPR/C/69/D/770/1997, ¶ 3.5 (2000); ECtHR, *Alenet de Ribemont v. France*, Appl. No. 15175/89, ¶ 41 (1995).

¹¹² ECtHR, *Butkevičius v. Lithuania*, Appl. No. 48279/99, ¶ 49 (2002); see also Human Rights Committee, *Karimov & Nusatov v. Tadjikistan*, U.N. Doc. CCPR/C/89/D/1108 & 1121/2002, ¶ 7.4 (2007).

¹¹³ ECtHR, *Alenet de Ribemont v. France*, Appl. No. 15175/89, ¶ 41 (1995).

¹¹⁴ See Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* 478 (OUP Oxford 2013).

¹¹⁵ ECtHR, *Y.B. and others v. Turkey*, Appl. Nos. 48173/99 & 48319/99, ¶ 11 (2004) (in the original French: “membres de l’organisation illégale ayant participé à l’incendie d’un bus municipal et aux manifestations [illégal]”).

¹¹⁶ *Id.* ¶ ¶ 50-51.

violation of the right to be presumed innocent, protected by Article 6(2) of the ECHR and Article 14(2) of the ICCPR.

D. ABUSIVE PROSECUTION

One of the fundamental aspects of democracy and the rule of law that international human rights law seeks to protect is the use of the administration of justice for purposes limited to the defence of the general interest. There is a rich history of governments abusing the judicial process to attack their opponents and critics through political trials. Article 18 of the ECHR specifically aims to proscribe such abuses by incorporating into international human rights law the doctrine of '*détournement de pouvoir*' or misuse of power.¹¹⁷ It provides that "[t]he restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed." While the ICCPR likewise proscribes politically motivated prosecutors, the ECtHR has developed much clearer standards for assessing when this is the case.¹¹⁸

As the text of Article 18 of the ECHR makes clear, it covers abusive restrictions of rights otherwise protected under the ECHR. As such, it does not have an autonomous scope, but rather is necessarily applied in conjunction with other protected rights under the ECHR. While substantive provisions seek to proscribe abusive violations of fundamental rights and freedoms, Article 18 aims at bad faith violations of these rights. Violations in bad faith and arbitrary denials of human rights are not necessarily coextensive: a political trial may be carried out by way of a fair trial respecting all due process guarantees, but its nefarious purpose nevertheless amounts to the misuse of power that Article 18 seeks to prohibit.¹¹⁹ Conversely, it is quite possible, and indeed a common occurrence, that there may be a violation of a substantive right without any illegitimate purpose.

There is indeed a presumption that governments are using their powers in good faith, but it may be rebutted by establishing the illegitimate purpose of the restriction of a protected human right. The jurisprudence of the European Court of Human Rights related to Article 18 has grown significantly over the last fifteen years, with most decisions linking restrictions on the right to liberty under Article 5 to the illegitimate purpose of silencing political opponents or intimidating human rights defenders.¹²⁰ Given the facts discussed above, the arrest, detention and prosecution of Mr. Altinel correspond exactly to this pattern, and constitute a violation of Article 18.

¹¹⁷ ECtHR, *Merabishvili v Georgia* (GC), Appl. No. 72508/13, ¶ 154 (2017).

¹¹⁸ Human Rights Committee, *Khadzhiyev and Muradova v. Turkmenistan*, U.N. Doc. CCPR/C/122/D/2252/2013, 2018, para. 7.7; Human Rights Committee, *Nasheed v. Maldives*, U.N. Doc. CCPR/C/122/D/2851/2016, 2018, para. 8.7; William Schabas, *The European Convention on Human Rights: A Commentary* 623 (Oxford University Press 2016).

¹¹⁹ ECtHR, *Merabishvili v. Georgia* (GC), Appl. No. 72508/13, Concurring Opinion of Judge Yudkivska ¶ 7 (2017).

¹²⁰ See Floris Tan, *The Dawn of Article 18 ECHR: A Safeguard against European Rule of Law Backsliding*, 9 *Goettingen Journal of International Law* 109 (2018).

The first stage of the analysis under Article 18 is to establish an illegitimate purpose in conjunction with a restriction on a right protected by the ECHR. According to the jurisprudence of the European Court of Human Rights, if a state is acting in bad faith, it may have imposed restrictions on protected rights either in the exclusive pursuit of its illegitimate purpose or by way of combining legitimate and illegitimate purposes. In situations in which both legitimate and illegitimate purposes are combined, the Court in *Merabishvili* determined that there will be a violation of Article 18 of the ECHR only if it can be shown that the illegitimate purpose predominated.¹²¹

In the case of the arrest, detention and prosecution of Mr. Altinel, was there a legitimate purpose underpinning the restrictions imposed by Turkey upon his protected rights? As mentioned, it is possible that someone may be arrested in violation of the ECHR, but in good faith, because of some negligence or miscalculation of what measures were proportional in the circumstances. In this case, however, no facts were presented that could ground a reasonable suspicion that Mr. Altinel had committed a crime under Turkish law, such that there was no basis that could justify his arrest and pre-trial detention. No legitimate purpose can therefore be identified that could justify the restriction of the right to liberty protected by Article 5(1) of the ECHR.

As the European Court of Human Rights noted in recent cases like *Kavala v. Turkey* and *Ismayilova v. Azerbaijan*, the fact that no legitimate purpose can be shown to exist does not in itself establish the existence of an illegitimate purpose.¹²² To meet the very high threshold of a violation of Article 18, it must be shown that the violation of a substantive right was driven by a nefarious purpose. While the Court does not assign a burden of proof, preferring to state that it simply considers all the evidence brought before it, it has clearly stated that the mere suspicion of a hidden agenda is not enough to show the presence of an illegitimate purpose.¹²³ On the other hand, the Court has acknowledged that it is very often impossible for an applicant to adduce direct evidence of the state's bad faith, and has held that proof of an illegitimate purpose may be shown by way of circumstantial evidence leading to inferences about primary facts.¹²⁴ In past cases, the European Court of Human Rights had relied on the following elements as circumstantial evidence of a state's bad faith: the fact that the state justified the applicant's arrest and detention on the basis of facts that were lawful activities under domestic law, and often corresponded to the exercise of rights and freedoms protected under the ECHR; the behaviour of prosecuting authorities, including delays between the arrest and the laying of charges; appearances of political interference in the case, when there appears to be a correlation between hostile statements by public officials and the timing or wording of

¹²¹ ECtHR, *Merabishvili v. Georgia* (GC), Appl. No. 72508/13, Opinion of the Court ¶ 305 (2017).

¹²² ECtHR, *Kavala v. Turkey*, Appl. No. 28749/18, ¶ 219 (2019); ECtHR, *Ismayilova v. Azerbaijan* (No 2), Appl. No. 30778/15, ¶ 112 (2020).

¹²³ ECtHR, *Tchankotadze v. Georgia*, Appl. No. 15256/05, ¶ 114 (2016).

¹²⁴ ECtHR, *Merabishvili v. Georgia* (GC), Appl. No. 72508/13, Opinion of the Court, ¶¶ 316-317 (2017); ECtHR *Ibrahimov & Mammadov v. Azerbaijan*, Appl. No. 63571/16, ¶ 147 (2020).

criminal charges against the applicant.¹²⁵ In assessing whether an illegitimate purpose was a predominant factor in the restriction of protected rights, its nature and degree of reprehensibility will be considered. In other words, the extent to which the restrictions contravened the ideals and values of a democratic society governed by the rule of law will be taken into consideration in weighing the significance of the state's bad faith in a given case. The fact that restrictions to protected rights fit into a pattern of arbitrary arrest and detention can both contribute to circumstantial evidence of an illegitimate purpose and signal a broader context inimical to the fundamental ideals and values of the ECHR.¹²⁶

When the criteria laid out by the European Court of Human Rights under Article 18 of the ECHR are applied to the facts of Mr. Altinel's case, they leave no doubt that his treatment by Turkey amounted to a violation of that provision. As noted previously, there was no factual basis presented on which a reasonable observer could conclude that he had committed a crime under Turkish law, and so there was no legitimate purpose that can be associated with his initial arrest and detention. This is therefore not a case of a restriction on rights pursuing a plurality of purposes. The illegitimate nature of the actual purpose motivating these restriction becomes apparent when the particular circumstances of the violation of Article 5 are considered: as in *Kavala*, the facts that were invoked as justification for Mr. Altinel's arrest and detention consisted of lawful activities that corresponded to the exercise of human rights protected under the ECHR¹²⁷; as in *Mammadov*, Mr. Altinel was punished for disseminating information that he genuinely and reasonably believed to be true¹²⁸; as in *Demirtas (No 2)* and *Kavala*, these violations of substantive human rights were accompanied by a public statement by a member of the executive branch that implied the guilt of Mr. Altinel before the judicial process could follow its proper course¹²⁹; as in *Ismayilova*, *Ibrahimov*, and *Demirtas*, the arbitrary arrest and detention of Mr. Altinel fit into a pattern of abusing the criminal process in an attempt to silence human rights defenders and political opponents, as clearly demonstrated in the fact that Mr. Altinel himself was caught in another wave of political prosecutions of 'Academics for Peace.'¹³⁰ The fact that Turkey, in this case, sought to interfere with the rightful enjoyment of freedoms protected by the ECHR in the territory of another state further compounds the seriousness of the interference with basic principles of democracy and the rule of law. All these elements combine to clearly demonstrate that the arrest and

¹²⁵ See ECtHR, *Kavala v. Turkey*, Appl. No. 28749/18, ¶¶ 223-229 (2019); ECtHR, *Demirtas v. Turkey (No 2)*, Appl. No. 14305/17, ¶ 170 (2018); ECtHR, *Ismayilova v. Azerbaijan (No 2)*, Appl. No. 30778/15, ¶ 14 (2020).

¹²⁶ ECtHR, *Ibrahimov & Mammadov v. Azerbaijan*, Appl. No. 63571/16, ¶ 151 (2020); ECtHR *Aliyev v. Azerbaijan*, Appl. Nos 68762/14 & 71200/14, ¶ 223 (2018).

¹²⁷ ECtHR, *Kavala v. Turkey*, Appl. No. 28749/18, ¶¶ 218-219 (2019).

¹²⁸ ECtHR, *Mammadov v. Azerbaijan (GC)*, Appl. No. 15172/13, Opinion of the Court, ¶ 36 (2019).

¹²⁹ ECtHR, *Demirtas v. Turkey (No 2)*, Appl. No. 14305/17 ¶ 270 (2018); ECtHR, *Kavala v. Turkey*, Appl. No. 28749/18, ¶ 229 (2019).

¹³⁰ ECtHR, *Ismayilova v. Azerbaijan (No 2)*, Appl. No. 30778/15 ¶ 113 (2020); ECtHR, *Ibrahimov & Mammadov v. Azerbaijan*, Appl. No. 63571/16 ¶ 151-152 (2020); ECtHR, *Demirtas v. Turkey (No 2)*, Appl. No. 14305/17 ¶ 264 (2018).

detention of Mr. Altinel were carried out by Turkey in bad faith, in violation of Article 18 of the ECHR.

CONCLUSION AND GRADE



As demonstrated by the court proceedings and related filings, Mr. Altinel's arrest, detention, and trial violated his rights. While the court's decision to acquit Mr. Altinel is to be welcomed, his prosecution was carried out in bad faith, in violation of Article 18 of the European Convention on Human Rights. It is especially concerning that, in a number of respects, Mr. Altinel's trial corresponded to other cases in which the European Court of Human Rights had already found Turkey's actions to constitute violations of the Convention. This pattern should not be further repeated.

GRADE:

C



GRADING METHODOLOGY

Experts should assign a grade of A, B, C, D, or F to the trial reflecting their view of whether and the extent to which the trial complied with relevant international human rights law, taking into account, *inter alia*:

- The severity of the violation(s) that occurred;
- Whether the violation(s) affected the outcome of the trial;
- Whether the charges were brought in whole or in part for improper motives, including political motives, economic motives, discrimination, such as on the basis of “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,”¹³¹ and retaliation for human rights advocacy (even if the defendant was ultimately acquitted);
- The extent of the harm related to the charges (including but not limited to whether the defendant was unjustly convicted and, if so, the sentence imposed; whether the defendant was kept in unjustified pretrial detention, even if the defendant was ultimately acquitted at trial; whether the defendant was mistreated in connection with the charges or trial; and/or the extent to which the defendant’s reputation was harmed by virtue of the bringing of charges); and
- The compatibility of the law and procedure pursuant to which the defendant was prosecuted with international human rights law.

Grading Levels

- A: A trial that, based on the monitoring, appeared to comply with international standards.
- B: A trial that appeared to generally comply with relevant human rights standards excepting minor violations, and where the violation(s) had no effect on the outcome and did not result in significant harm.
- C: A trial that did not meet international standards, but where the violation(s) had no effect on the outcome and did not result in significant harm.
- D: A trial characterized by one or more violations of international standards that affected the outcome and/or resulted in significant harm.
- F: A trial that entailed a gross violation of international standards that affected the outcome and/or resulted in significant harm.

¹³¹ ICCPR, Article 26.