

# Suppressing Academic Debate: The Turkish Penal Code

## Trial Observation Report

June 2006

Kurdish Human Rights Project  
Bar Human Rights Committee

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**KHRP**  
Established 1992

**Bar Human  
Rights  
Committee**  
OF ENGLAND AND WALES







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BAR HUMAN RIGHTS COMMITTEE OF ENGLAND AND WALES

# Acknowledgements

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Kurdish Human Rights Project (KHRP) is an independent, non-political, non-governmental human rights organisation founded and based in London, England. KHRP is a registered charity and is committed to the promotion and protection of the human rights of all persons living within the Kurdish regions, irrespective of race, religion, sex, political persuasion or other belief or opinion. Its supporters include both Kurdish and non-Kurdish people.



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## Foreword

Free expression was one of the main driving forces behind the legislative reforms conducted by the Turkish Government as part of the European Union accession process. The legislative amendments were intended to liberalise the Turkish legal system in order to permit non-violent expressions of opinion. The provisions of the new Turkish Penal Code, which came into force in June 2005, still carry, however, heavy penalties for writers, journalists and publishers and prosecutions continue to be frequently instigated.

Edward Grieves, a barrister at Garden Court Chambers and a member of the Bar Human Rights Committee, was sent by KHRP to observe the trial of Professor Baskın Oran and Professor İbrahim Özden Kaboğlu in the General Criminal Court in Ankara, Turkey in February 2006.

These two individuals were charged under articles 301 and 216 of the revised Turkish Penal Code. The charges were brought against these two eminent academics following the release of a report under the auspices of the Human Rights Advisory Board of the Prime Ministry (BIHDK), a body set up by the Turkish Government to oversee its own adherence to human rights standards. Professor Kaboğlu was selected to be the President of this body and Professor Oran was chair of the working group on Minority and Cultural Rights. This working group produced a report, commissioned by the prime minister's own office, in which it was argued that "Turk" is an identity of only one ethnic group and that Turkey also includes other ethnic groups such as "Kurds" or "Arabs". This was considered to be sufficient "denigration" of the Turkish state to warrant criminal proceedings under article 301 and 216.

Although these two individuals have subsequently been acquitted, this report analyses the indictment and highlights how the instant prosecution was wholly unjustifiable. What this case aptly demonstrates is how the series of amendments to the Penal Code enacted by the Turkish authorities since the beginning of the EU Accession process have left a raft of provisions which continue to criminalise non-violent expressions of political opinion in Turkey and exert a chilling effect on the freedom of speech. We concur with the recommendations of this report

that article 301 must be repealed, that more human rights training should be given to prosecutors and that the European Commission should monitor more closely prosecutions brought against writers, academics and journalists. We also hope that this report can help to contribute to the on-going debate regarding the Turkish Penal Code and the legislative reform process more generally in Turkey.

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## Introduction

*‘In October 2004 a report released under the auspices of the Human Rights Advisory Board – a state body which reports to the Office of the Prime Minister - questioned the policy on minorities and communities, highlighting in particular the restrictive interpretation of the 1923 Treaty of Lausanne and encouraging Turkey to align its policy with international standards. The report also called for a review of the Turkish Constitution and all related laws to give them a liberal, pluralistic and democratic content with a view to guaranteeing the rights of people with different identities and cultures to protect and develop these based on equal citizenship.*

*The report provoked a lively debate within Turkey. However, it was of concern that an investigation was subsequently launched against the author of the report and the chairman of the Board and that those directly responsible for the report resigned, claiming that their positions were untenable. The Board has not been operating since this time.<sup>1</sup>*

This Report traces the extraordinary trial of Professor Baskın Oran and Professor İbrahim Özden Kaboğlu, accused under Articles 301 and 216 for insulting state institutions and inciting people to enmity and hatred.

Professor Kaboğlu, as president of the Human Rights Advisory Board, and Professor Oran, as chair of the Working Group on Minority and Cultural Rights of that Advisory Board, face charges on account of the contents of a Report published by the Advisory Board. This has subsequently been dubbed the “The Minority Report”.<sup>2</sup>

What is extraordinary about this trial is that the Turkish Government established the Advisory Board, chose its membership and mandated the Board to produce

1 European Commission, “2005 Regular Report on Turkey’s Progress Towards Accession”, COM (2005) 561 final, 9 November 2005

2 The Human Rights Advisory Board “The Minority Rights and Cultural Rights Working Group Report” October 2004. The report was updated and approved by the General Assembly on 1 October 2004 (signed by Working Group members on July 2003) and presented to the Prime Ministry on 22 October 2004.

reports such as the Minority Report. The Report itself is an academic study of minority rights in Turkey and contains various opinions and recommendations. The prosecution was therefore brought against the defendants by the State, for discharging the very duty it required them to undertake.

The Defendants have been swiftly acquitted by the General Criminal Court in Ankara in February 2006. However, the fact that the prosecution was brought in the first place is still very troubling.

Part one of this report seeks to contextualise the response to the Minority Report by briefly examining the position of minority rights in Turkey. Part two of this report contains a narrative of the events leading up to, and including, the first hearing at the 28<sup>th</sup> Court of the General Criminal Court in Ankara on 15 March 2006 and the final acquittal of the Defendants. Part three places this trial in a wider context of recurring attacks against the right to freedom of expression in Turkey, notably against journalists, publishers, writers and artists. In Part four, Turkey's domestic and international obligations are briefly considered. Part five analyses Turkey's compliance with its legal obligations in its conduct of the instant prosecution. Part six of the report concludes with a number of recommendations.

## Part I - Minority Rights in Turkey

It will become clear later in this report when the nature of the prosecution is examined that Turkey has historically taken a restrictive definition of ‘minorities’. Essentially, Turkey recognises the concept of ‘minority’ by reference to whether or not an individual is a Muslim or not. This excludes consideration, and therefore explicit protection, of other sub-identities within the citizenry of Turkey.

The 2005 Progress Report of Turkey by the European Commission<sup>3</sup> stated, *inter alia*, the following:

*Minority rights, cultural rights and the protection of minorities*

Turkey’s approach to minority rights remains unchanged since last year’s report. According to the Turkish authorities, under the 1923 Treaty of Lausanne, minorities in Turkey consist exclusively of non-Muslim communities. The minorities usually associated by the authorities with the Treaty of Lausanne are Jews, Armenians and Greeks. However, there are other communities in Turkey which, in the light of the relevant international and European standards, could qualify as minorities...

Turkey’s reservation to the UN Covenant on Civil and Political Rights (ICCPR), regarding the rights of minorities – to which a number of EU Member States objected as being incompatible with the object and purpose of this Covenant - and its reservation to the UN Covenant on Economic, Social and Cultural Rights (ICESCR), regarding the right to education, are of concern. These could be used to prevent further progress on the protection of minority rights. In particular, it is to be hoped that Turkey’s reservations to the Covenants will not mean that the rights guaranteed under these articles are limited only to those communities mentioned in the provisions and rules referred to in the reservations.

In February 2005 the OSCE High Commissioner on National Minorities

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3 European Commission, “2005 Regular Report on Turkey’s Progress Towards Accession”, COM (2005) 561 final, 9 November 2005

(HCNM) visited Ankara on Turkey's invitation in order to follow up on his 2003 visit. However, little progress was made in expanding the dialogue beyond the abovementioned traditional approach and that the HCNM's proposal to visit the south-east Turkey was not accommodated. The resumption of talks with the HCNM on a broader basis would help to facilitate Turkey's further alignment with best practice in EU Member States.

Turkey has not signed the Council of Europe Framework Convention for the Protection of National Minorities or the European Charter for Regional or Minority Languages. It has not yet ratified Additional Protocol No 12 to the ECHR on the general prohibition of discrimination by public authorities. This is particularly important given that minorities are often subject to *de facto* discrimination, and encounter difficulties in acceding to administrative and military positions.

In January 2005, Governors' Offices under the Ministry of Interior assumed responsibility for a number of issues related to non-Muslim minorities – including their health, social, cultural and educational institutions – which had previously fallen under the responsibility of the Provincial Security Directorates. The transfer of relevant documents to the Governors' offices is reportedly ongoing.

Despite the work on the review of discriminatory language in schoolbooks, which has been ongoing for the past two years through the work of the National Committee of Education, the history textbooks for the 2005/06 school year still portrayed minorities as untrustworthy, traitorous and harmful to the state. In February 2005 the History Foundation, which is assisting this Committee, issued a number of recommendations, which, inter alia, call on the Ministry of Education to amend textbooks such that they promote an image of a pluralist society in which diversity is perceived as an asset, not a threat. In its recent report on Turkey, the European Commission against Racism and Intolerance (ECRI) encourages the authorities to “revise school curricula and textbooks... in order to heighten pupils' awareness of the advantages of multicultural society”.

As regards the dialogue with the authorities on the issue of dual presidency in the Jewish, Greek and Armenian schools (the deputy head of these schools is a Muslim representing the Ministry of Education and has more powers than the head) no progress has been made. The Greek minority continues to encounter problems obtaining approval for new teaching materials and the recognition of teachers trained abroad. The ECRI report encourages the authorities to take the necessary steps to ensure the proper functioning of minority schools.

Moreover, in contravention of the 2003 Labour Law and in contrast with the

situation of their colleagues of Turkish origin, Greek minority teachers are still only permitted to teach in one school. The training of Armenian language teachers is still not possible pending acceptance by the Turkish authorities of an Armenian department within an Istanbul university for the study of the Armenian language. Non-Muslim minorities not usually associated by the authorities with the Treaty of Lausanne, such as Syrians, are still not permitted to establish schools.

In practice Greek citizens have problems inheriting property, despite the existence of a decree which appears to grant them such rights. At least one case has been lodged with the ECtHR in relation to this issue.

The Greek minority on the island of Gökçeada (Imvros) continues to encounter a number of difficulties. These relate, in particular, to the land registry and the designation of land and buildings as “monuments of nature or culture”, which has led to the confiscation of property. Moreover, there are reports of tenders being launched for land which was expropriated in the past and a former Greek minority school started operating as a hotel in June 2005 against the wishes of this minority. In April 2005 Prime Minister Erdoğan visited the island for the first time and listened to the concerns of this community. In June 2005 a Turkish and a Greek member of the Council of Europe’s Parliamentary Assembly also visited the island and concluded that the Greek minority encounters a number of difficulties. The Turkish member expressed his intention to propose legislative changes to address these issues.

Legislation preventing Roma from entering Turkey as immigrants is still in force. Roma reportedly experience difficulties in accessing adequate housing, education, health and employment. During the past two years Roma-led advocacy organisations have been established in five Turkish cities. In cooperation with these organisations Istanbul’s Bilgi University has begun to conduct research aimed at mapping the exact number and location of Roma in Turkey and at establishing a clearer picture of the problems that they encounter. As regards the protection of cultural rights, there has been only limited progress since the last Regular Report. Broadcasting in languages other than Turkish, including Kurdish is ongoing, but significant restrictions remain.

The teaching of Kurdish suffered a serious setback in August 2005 when the owners of all existing courses decided to close the 5 remaining schools, despite the fact that one of these – the school in Mardin - had opened as recently as April 2005. Two schools - in Adana and in Batman - had closed down earlier in the year due to financial difficulties.

The decision to close down these courses was motivated by several factors,

including a lack of financial resources and restrictions concerning, in particular, the curriculum, the appointment of teachers, the timetable and the attendees. More generally, the course owners claimed that the demand for such courses is limited, particularly as it is necessary to pay for them.

The ECRI report encourages the Turkish authorities to revise Article 42 of the Constitution, which prohibits the teaching of any language other than Turkish as a mother tongue in state schools. The report at the same time highlights the importance of ensuring that sufficient provision is made for children whose mother tongue is not Turkish to learn the language. Moreover, the report emphasises the need to take comprehensive measures aimed at overcoming barriers to access to public services for those who do not speak Turkish.

Despite a greater tolerance towards the use of the Kurdish language and the expression of Kurdish culture in its different forms during the past few years, tension rose in early 2005, due in part to continued violence in the Southeast (*see section on Southeast*). While this year's Newroz celebrations in March were authorised and peaceful in most provinces, an incident in Mersin related to the tearing of the Turkish flag by two children ignited certain nationalist reactions.

The judiciary's role in guaranteeing the right to use Kurdish is mixed. In May 2005 the Court of Cassation revoked a decision which had banned the use of Kurdish music during an election campaign. However, a Criminal Court in Diyarbakir ordered the confiscation of a number of music albums in January and February 2005 on the basis of Article 312 of the former Penal Code, claiming that the Kurdish language lyrics constituted propaganda in support of an illegal organisation. Moreover, problems continue to be reported concerning the registration of certain Kurdish names, and practice varies throughout the country.

There are still restrictions on the use of languages other than Turkish by political parties. In October 2005 a court sentenced DEHAP deputy leader Reşit Yardımcı to six months imprisonment for greeting a DEHAP conference in Kurdish in 2003. In May 2005 the trial of Abdulmelik Fırat, Chairman of the Rights and Freedoms party (HAKPAR), began. He is accused of reading statements in Kurdish during a party meeting in January 2004. A number of similar cases, brought on the basis of the Law on Political Parties, are ongoing.<sup>4</sup>

This attitude and approach to minority rights goes some way to explaining the reaction of certain sections of Turkish society to the Minority Report.<sup>4</sup>

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<sup>4</sup> *The Kurds: Cultural and Language Rights* (KHRP: London), 2004

## Part II - The Trial and its Origin

This part describes the chronology of events which ultimately led to a prosecution. It follows the rationale for the prosecution, the defences raised and the issues at stake. The chain of events begins with the creation of the Human Rights Advisory Board.

### A. The Human Rights Advisory Board

#### 1. Establishment

The Human Rights Advisory Board (the 'Advisory Board') was established in February 2003 by the Government under Article 5 of the *Law Amending the Decree No: 3056 on the Organisation of the Prime Ministry*.

The prosecution indictment describes the terms of establishment under Article 5:

'The Advisory Board was established to ensure communications between the relevant public institutions and the NGO's on issues relating to human rights and to function as an advisory body on national and international issues. The Board shall be affiliated to a State Minister to be designated by the Prime Minister. The Advisory Board shall consist of representatives of ministries, public institutions and bodies and professional associations relating to human rights, representatives of human rights NGOs and persons who have publications and works in this field. The Advisory Board shall be chaired by a person to be elected among them. The secretariat services of the Board shall be performed by the Human Rights Presidency. The expenses of the Board shall be met from the budget of the Prime Ministry.'

Accordingly, the Government chose a broad range of groups and individuals to participate in the Advisory Board and invited them to serve on the Advisory Board. Professor Oran describes how he came to be on the Board:

'One day a yellow envelope was delivered to the faculty which stated that I was

appointed to the Commission of HRA as human rights expert academician.’

The Advisory Board comprised of a president, two vice-presidents, 2 rapporteurs and the general membership. Professor İbrahim Özden Kaboğlu, an academic from Marmara University, was appointed President of the Advisory Board.

## 2. Duties and functioning

According to Article 2 of Law No: 4643

‘The principles and procedures relating to the ... duties and functioning of the Supreme Board of Human Rights, the Human Rights Advisory Board and the delegation to be appointed to investigate human rights shall be laid down in a regulation to be issued by the prime ministry...’

The relevant regulation relating to the duties and functioning of the Advisory Board entered into force on 23 November 2003. According to Article 5 of this regulation, the duties of the board are as follows:

- a) to issue an opinion and recommendation, as well as to give advice and to submit reports on issues relating to the promotion and protection of human rights;
- b) to issue an opinion and to advise administrative measures in order to ensure that the existing legislation and draft bills are brought into line with the fundamental principles of human rights, and the international instruments and mechanisms in this area,
- c) to ensure communication among the relevant state institutions, universities and civil society organisations on issues relating to human rights;
- d) to act as an advisory body on national and international affairs encompassing human rights;
- e) to tackle the issues requested by the Supreme Board and to conduct the necessary work and to submit an opinion;
- f) to submit reports to the Minister and the Supreme Board on the general situation of human rights violations throughout the country and prohibition of torture, freedom of thought, freedom of association as well as on other issues in the field of fundamental human rights;

- g) to submit an opinion to the Minister and the Supreme Board on international affairs relating to human rights, including racism, all forms of discrimination and xenophobia.

According to Article 6 of the regulation, meetings of the Advisory Board were to be held with more than half of the members. In order for a decision to be validly made, they had to be sanctioned by more than half of the members present at the meeting.

## **B. The Minority Report**

The Advisory Board met for the first time in February 2003 and, in line with its mandate, consequently established 13 separate working groups. The subject matter that each group was to concern itself with was determined by reference to well established human rights areas and included the prevention of torture, rights of the child, women's rights and economic and social rights. Professor Baskin Oran was chosen to chair the Minority Rights and Cultural Rights Group. Professor Oran had been an academic at Ankara University in the Department of Economic and Administrative Sciences for 37 years.

The Advisory Board met regularly and dealt successfully, for example, with the issue of torture in Turkey. A report on this subject was produced, finalised and presented to the general membership and the Turkish Government. There was little controversy over the content of this report. It was reported to this observer that it was of surprise to many members of the Advisory Board that it was the report on Minority Rights and Cultural Rights which generated an outcry.

The passage to ratification by the Advisory Board of the Minority Report was not marked by any particular difficulties. It followed the usual procedural course through the Advisory Board, where drafts were presented on behalf of the sub group to the General Assembly and discussed. The General Assembly of the Council met on three occasions to discuss the wording of the report and it was finalised on 1 October 2004. Out of a total Assembly membership of 78, 54 individuals attended that meeting and 28 of those approved the content of the report subject to agreed minor wording changes.

The Working Group's report is divided into 5 parts. In part 1 the Report deals with the historical emergence of the concept of a 'minority'.

Part 2 describes the concept of a minority in Turkey and highlights its restrictive interpretation - minority groups in Turkey are simply non-Muslims - and Turkey's

discriminatory approach to some minority groups. It also describes the failure of Turkey to implement certain provisions of the Lausanne Treaty 1923.

Part 3 of the Report deals with legislation and practice in Turkey. It states, *inter alia*:

“When the principle of the “indivisible integrity of the State with its territory and nation”, which is repeated in countless articles of the Constitution and law, is interpreted in such a way as to reject cultural sub-identities, the legislation in Turkey becomes one that tends to assume that “recognition of sub identities” is meant to disturb the said identity, and therefore to charge those who do so with “separatism and subversion”. Important laws such as the law for the Fight against Terrorism, the law on the Duties and Powers of the Police, the Radio and Television law, the law of Associations and the law of Political Parties heavily punish “creation of minorities by asserting the existence of minorities based on ethnic and linguistic differences.”.

Part 4 deals with relevant judgements in Turkey. It begins by stating:

‘It is also true that the Constitutional Court, while making interpretations, ignores certain fundamental concepts of law and this causes further damage to democracy in Turkey... in its decision to ban the TEP, the ...Court first stated that it was possible to speak of the existence of different identities but maintained its former position by immediately adding afterwards that the assertion of different identities would lead to “a tendency to break away from the whole in the course of time”. This attitude stems from a fear that recognition of people from different ethnic, religious, cultural etc. backgrounds in Turkey would result in the fragmentation of the State.’

Part 4 goes on to further analyse specific decisions of the Court of Cassation.

Part 5 of the Report develops the background situation in Turkey and suggests a number of reasons for the current treatment of the concept of minority in Turkey. The report suggests that being a “Turk” is perceived as being a member of a race, not as representing citizenship of the country of Turkey and hence;

‘This situation alienated the other sub-identities who do not consider themselves of the Turkish race and created problems. This wouldn’t have happened had the supra identity been “Türkiyeli” (“being from Turkey”). Because then it would have embraced all sub identities equally without involving ethnic, religious etc. aspects...’

The Report concludes by identifying a number of important principles and

accordingly makes the following recommendations:

- ‘1) The constitution of the Republic of Turkey and all related laws must be rewritten so as to have a liberal, pluralistic and democratic content and with the participation of all organisations of civil society;
- 2) The rights of people with a different identity and culture to protect and develop their identities (such as rights of publication, self expression and education) based on equal citizenship should be guaranteed;
- 3) The central government and local governments must be made transparent and democratic, based on public participation and control;
- 4) International conventions and basic instruments that include universal norms of human rights and freedoms, particularly the Framework Convention of the Council of Europe, must be signed, ratified and implemented without reservation. From now on, no reservation or statements of interpretation that would mean a denial of the sub-identities in Turkey must be made to international conventions’

### **C. The Press Conference**

The usual steps of publicising the report were taken and a press conference organised on 22 October 2004. At this conference the president of the Advisory Board, Professor Kaboğlu, began to read out the content of the report. At this point two men leaped onto the stage, grabbed the report from which the Professor was reading and tore it up. One of the men was a member of the Advisory Council and part of the Minority Rights Working Group. The men declared that the report was aimed at dividing the Turkish public and was an externally funded ploy against Turkey.

### **D. The Origin of the Prosecution**

In the judicial system of Turkey, the State may initiate an investigation of its own motion<sup>5</sup> or the prosecutor may begin an investigation after receiving a complaint

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5 For particular crimes

from a private citizen. An official complaint from a citizen will usually warrant an investigation. However, this is equally likely to lead to an indictment being prepared and lodged at the appropriate court. This is because prosecutors have not traditionally acted as a filter to sift out unmeritorious prosecutions. This role is left to the Judge who conducts a long and protracted fact finding exercise, usually lasting several years.

The prosecution in this instance emanated from two sources. The first source was the two private complainants, the men who interrupted the press conference; and the second was from the public prosecutor of his own motion.

The investigation, during which time Professor Oran gave a detailed statement, took 10 months and it was over a year before an indictment was finally issued on 14 November 2005.

## E. The Indictment

The prosecution was initiated in Ankara Criminal Court under two Articles of the amended Turkish Criminal Code (Law No: 5237): Articles 216(1) and 301(2).

Article 216(1) can be found in the fifth section ('Offences Against Public Peace') of the third chapter ('Offences Against Community') in Volume 2 of the Criminal Code ('Special Provisions') and states:

- '1) Any person who openly incites a group of people belonging to different social class, religion, race, sect, or coming from another origin, to enmity or hatred against another group, is punished with imprisonment from one year to three years in cases where such act causes a risk of public disorder.'

**Article 301(2)** is found in the Third Section ('Offences against the Sovereignty and Supreme Political Organs of the State') of the fourth chapter ('Offences Against Nation and State and Final Provisions') in volume 2 of the Criminal Code and states:

- '(2) Public denigration [or insult] of the Government of the Republic of Turkey, the judicial institutions of the State, the military or security structures shall be punishable by imprisonment of between six months and two years....

...Expressions of thought intended to criticise shall not constitute

a crime.’

## F. The Stated Basis of the Prosecution

The Indictment is not a conventional document. It begins by setting out the constitutional principles of the Advisory Board and makes clear the aims and purpose of the Advisory Board. It is clear from the indictment itself that the Board had a specific mandate to carry out the work done on the ‘Minority Report’. However, the indictment then proceeds to effectively challenge the academic analysis propounded in the Minority Report and embarks upon a comprehensive disagreement with the opinions expressed therein. This section of the indictment is the most voluminous and begins with a disagreement with the definition of minority as suggested by the Minority Report:

‘So, in Turkey, minorities are the non-Muslim citizens. Apart from them, there are no minorities based on based on ethnic, religious or linguistic grounds. All citizens who are outside the mentioned group, who have played a role in the establishment of this State and who are within these borders are the constituent elements of this State and not “minorities”. It is worth noting that, contrary to the Report, which states that the definition of a minority is based on religious, ethnic and linguistic grounds, Greece also considers “religion” as a criterion in parallel to Turkey’

The indictment recalls at this point, by way of parallel example, that France has not signed ‘The Framework Convention for the Protection of National Minorities’ and that France has defended this by stating, ‘Minority is a concept that is alien to French laws’. The indictment concludes at this point that:

‘Therefore to make/create a new minority definition along with a new application thereof other than the concept of minority accepted within the Treaty of Lausanne will cause chaos and will lead to a result that will endanger the unitary structure of the State which includes a lot of ethnic groups within it, the territorial unity and the indivisible unity of the State.’

The Indictment then goes on to challenge the Minority Report’s proposition that ‘the concept of “the indivisible entity of the nation” is quite perverse to a Westerner although it comes natural to us. It implies the nation is monolithic, effectively denying the various sub-identities that make up the nation and therefore contravening the essence of democracy.’ The Indictment argues:

‘According to [the general principles in section I of the Constitution] the

Republic of Turkey is a Unitarian state with her territories and nation. Here the term “nation” is not one ethnic origin but a community made of citizens who live in that country, who have a common history, with all the elements that make that nation.’

The indictment goes on to argue that far from the concept being alien to a Westerner, ‘the Spanish Constitution, just like the Constitution of the Republic of Turkey, includes the principle of indivisibility of the nation.’

The indictment answers the criticism in the Minority Report of some of the judgements of the Supreme Court by stating:

‘Discussion of a decision rendered by a judicial body on a legal basis is a very common, even essential practice for law. However, the report not only discusses and criticises the decisions of the Supreme Court, it also shows the Constitutional Court as an obstacle in the realisation of democracy. Yet, with many of its decisions the Constitutional Court has made contemporary interpretations which clear the path for democracy and freedoms in Turkey.’

The Indictment then seeks to counter the suggestion that the cause of certain problems relating to minorities is that sub-identities have been alienated by the use of the word ‘Turk’ as opposed to a word suggesting ‘being from Turkey’. The indictment does this by recalling that:

‘England calls its citizens English, not “people from England”; the State of Germany calls its citizens German, not “people from Germany”...for example, the French nation, that is the ethnic elements forming France, consists of Celts, the Flemish, Alsatians, Catalans, Basques, Bretons, Normans and other races. Whether it does not cause any problems for a French citizen to say he is French when saying “Je suis Français”... what is the reason behind asking that a Turkish citizen call himself/herself a “Türkiyeli” (a person from Turkey), or is it pertinent to expect it? When suggesting the term, “Turkiyeli”, a territory based term, instead of “Turk”, is the report unaware that the name of the country, Turkey (Türkiye), also has an ethnic association, or is it yet too early for such a warning?’

The indictment sets out the alleged reasons for the actual prosecution, which are the alleged breaches of the substantive criminal code:

‘The Report has been subject to investigation due to the following reasons:

1. Under part 2 of the Report entitled “The Concept of Minority in Turkey, its Definition and Cultural Rights” it is claimed that Turkey faces serious

difficulties in relation to the definition made for minorities and that Turkey has breached the provisions of the Lausanne Treaty;

2. In the part under the heading “Relevant legislation and Practice in Turkey” it is claimed that the principle of “national integrity” is wrong;
3. In the part under the heading of “Relevant Court Judgements in Turkey”, it is claimed that the Constitutional Court undermines democracy;
4. In the section on “The Theoretical Cause: The Relationship between the Super identity and sub-identities” under the heading of “Foundations of the situation in Turkey”, instead of the super identity of “being a Turk” the super identity of “being from Turkey” is recommended.

The indictment goes on to say:

“What leads to an offence here are “the approval of the report despite the lack of quorum and despite this had been voiced by some members, and making the report appear as if it were valid and its approval had complied with the procedures”, and “the announcing of the report as if it were prepared by the Prime Ministry” and as if it included the confessions of the State” although the Board had no relation to the Prime Ministry. Additionally, during the announcement of the Report to the public opinion through a press statement it was presented as the corrected form, aiming at the creation of the image that it had been written on the will of all board members.”

In its assessment of Article 301 and specifically the defence of the ability to freely criticise, the indictment states:

‘What is done in the report is not mere criticism or expression of opinion but something beyond that. The fundamental elements of the Republic of Turkey have been targeted; and in doing so, the Report was presented as if it had been prepared by the Prime Ministry’

In its assessment of Article 216, the indictment cites the applicable law relating to inciting people to enmity and hatred. It states, *inter alia*:

- i) there must be a clear and present danger of a public disorder over and above that to be expected under normal public order. “Clear is something so evident that there is no doubt about the existence of danger whereas present refers to the closeness of the possibility of the creation of damage”;

- ii) to incite means “an explicit psychological pressure imposed on others to act in a certain way” or a behaviour, the object of which is to set a person into action and aims directly at psychological effect upon the will.

To establish an offence the following elements have to be proven:

- a) People should be incited to enmity or hatred against one another;
- b) This act of incitement should be based upon social class, race religion, sect or regional differences;
- c) The acts undertaken during the act of inciting should be such that there may be a potential disruption of public order;
- d) The perpetrator should have the intention to commit that offence

The indictment merely states, in terms of actual argument in respect of the evidence purportedly establishing these elements;

‘when the reactions and the indignation after its announcement are taken into account, all these elements exist in the ...Report prepared by the suspects.’

## **G. The Defence**

### 1. Technical Points

At the hearing the Defence Legal Team took the following four technical points:

#### *a. Permission to Prosecute: Academic Institution*

Both of the Defendants are employed academics at their respective universities of Marmara and Ankara. According to the Law on Higher Education 2547, under Article 53(7), as a general rule, a prosecution cannot be initiated unless permission is granted by the Vice Chancellor of the Defendant’s university or the Higher Education Board (YOK). No such permission was sought or granted in this case.

#### *b. Permission to Prosecute: Minister of Justice*

In order to initiate a prosecution under Article 301, permission is required from the Minister of Justice. No such permission has been obtained.

c. *Competency and Jurisdiction*

The investigation was initially instigated under the laws relating to the press and media as the alleged crime became known through the media. The matter should therefore have been prosecuted in the specialised media courts. Instead, the indictment was sent to the ordinary criminal court.

A related point is that under the press and media law, the prosecution must be initiated within two months from the date of publication in the media. Such time limit has been breached in this case, the prosecution having been lodged 10 months after the event.

d. *Components of the Offence*

The constituent components of the offences have clearly not been made out.

2. Substantive Defence

Both Professor Kaboğlu and Professor Oran orally delivered written speeches.

Professor Oran's defence took over two hours to deliver, in which he essentially read his written defence; a critique of the prosecution and the decision to prosecute.

Professor Oran describes the Indictment as a 'thesis' rather than a document containing legitimate allegations under the Criminal Code. This is because the indictment merely presents an alternative academic analysis to the Minority Report:

'What does the Public Prosecutor's Office do in this case? It attempts to disprove our scientific report throughout the entire indictment and tries to draft a counter-report claiming that the content of the report is erroneous and that is not the way to write it...A prosecutor is obliged to claim and prove the offence. He cannot attempt to produce a counter-report. But this is what he has attempted to do in our case'

Professor Oran, therefore, categorises his defence as a 'counter-thesis' as opposed to a traditional 'defence' to an actual alleged crime with its constituent parts. He makes ten points over 29 pages.

- Point one confronts the notion that the report was 'made public' by Professor Oran given that the report was prepared over one and a half years before, with the media present at every phase.

- Point two takes issue with the suggestion in the Indictment that ‘the Prime Ministry does not have any relation or link to the Board’.
- Point three addresses the comments made in the Indictment relating to the Lausanne Treaty and the definition of ‘Minority’. The professor asks rhetorically;

‘why is the indictment criticising the scientific analysis of the Lausanne Treaty. Is this indictment a document of international law or criminal law?’

- In point four, the Professor criticises the Indictment’s approach to minorities in that it states that Muslim citizens are ‘the essential dominant elements of the State’ and accuses the Indictment of committing the crime of trying to separate the country.
- The fifth and sixth points analyse the role of the Prosecutor in more detail and, *inter alia*, states:

‘the ideology of the Public Prosecutor is his own business. This ideology may aim at restricting individual rights – and particularly the freedom of expression – as much as possible; and as far as we see, it is the case here. However this ideology cannot be reflected in the official indictment...this is an abuse of duty’

The sixth point ends with a detailed study of the linguistic, religious, administrative and territorial minorities in France.

- Point seven deals with the prosecutor’s comments regarding the placing in jeopardy of the “unitary structure of the state”. It highlights the lack of actual proof establishing the component elements of the alleged offences. This part ends with a detailed study of the linguistic, religious, administrative and territorial minorities in France.
- Point 8 deals with the concept of supra-identity and takes issue with various factual disagreements made by the Prosecutor. It offers explanations, particularly in relation to the way in which other countries refer to their citizens.
- In Point 9, the defence deals with the issue of criticising the Supreme Court. He states:

‘I am an academician, I can say anything I like so long as it is without insult or inciting a crime or violence. I can make any criticism I like. This is why I get a salary from the State.’

- Point 10 concludes the Report and includes an allegation that the Prosecutor has breached freedom of expression provisions in the ECHR by instigating the prosecution.

## H. The Conduct of the Hearing

The Defendants received a police escort to the Court in anticipation of difficulties entering the Court from hostile demonstrators. In the event, there were no detractors outside the Court.

The hearing took place on February 15<sup>th</sup> 2006 at Ankara's Court of First Instance. It was delayed while the Court registered witnesses that were intended to be called by the prosecution. During this time it was not possible for the large number of people who wished to observe the trial to enter the hearing room. The observers numbered over fifty and comprised personal supporters of both defendants and representatives from national and international NGO's. Representatives from the Embassy of the United States also attended. They all waited outside by the entrance for about one hour, after which time the public was allowed to enter.

The hearing room itself was very small. A larger room had been requested by the Defence but this request had not been granted. There was therefore very little space for the public to view the hearing. However, this did not prevent the observers from packing into the court room to listen to the proceedings. To a large degree, however, it was standing room only for most.

The Defendants were represented by at least 20 lawyers. Four advocates took the lead to present the technical arguments to the judge. There was very little in the way of submissions from the prosecutor, who sat alongside the judge, and little interaction from the judge during submissions.

After the preliminary submissions had been made the judge gave his judgement. He made no ruling on the technical points raised by the defence other than on the issue of permission to prosecute under Article 301. The judge ruled that as permission had not been obtained from the Ministry of Justice, the matter would not proceed until such permission was forthcoming.

Both Professor Oran and Professor Kaboğlu then presented their defences. This lasted a number of hours as the submissions were highly detailed. The speeches often raised laughter from the observers and lawyers as the professors injected their own humour into their arguments.

The hearing was then adjourned.

## **I. Post-Trial Observation**

### 1. The Acquittals

There were two further hearings of the case against Professor Oran and Professor Kaboğlu. At the second hearing of the case on 11<sup>th</sup> April 2006, in reply to the court's request, a report from the Ministry of Justice stated that there was no need for permission to be granted in the case to investigate charges of 'public humiliation of the courts authority'. The trial on article 301 was halted but the trial continued under article 216. At the second hearing on 10<sup>th</sup> May 2006, the judge formally dropped the charges against the defendants under article 301(2) and acquitted them of the charges under article 216(1).

### 2. Further Prosecutions

Since the verdicts were announced, Ankara Press Prosecutor's Office has commenced an official investigation in May 2006 of Professor Oran and Professor Kaboğlu to see if their defence contravened the criminal code. It would appear that the investigation was instigated because it is alleged that information contained within the defence's documents were shown to members of the press and published by some media channels before the actual trial started. The prosecutor's office sees that as an "exercise of influence on judicial procedure". Professor Baskın Oran has received a call from the public prosecutor's office to provide his defence statement. The prosecutor will then decide whether there will be a charge or case against him. This course of action has profound ramifications on the right of an individual to defend themselves appropriately.

## Part III - Freedom of Expression in Turkey

After criticism from the European Commission in its 2004 Progress report on Turkey, in May 2005 several amendments were made to the new Turkish Penal Code to bolster the right to freedom of expression. The aggravated sentences envisaged for a number of offences committed through the media were removed from some of the articles including such provisions.<sup>6</sup> More importantly, the amendments exempted from prosecution expressions that constitute “criticism”. However, a number of articles which have exerted a chilling effect on the freedom of expression in the past were not addressed by the May 2005 amendments. These and other articles still constitute a potential threat to freedom of expression given their vague wording and possible wide interpretation.

This is particularly the case with regard to a number of imprecisely drafted articles which refer to offences against symbols of state sovereignty, the reputation of state organs and national security. Article 301 of the new Penal Code (formerly Article 159, “insulting the State and State institutions”), in particular, has been used to prosecute and convict a number of writers and journalists. This is despite the fact that the article has been amended in such a way as to allow criticism.

The following individuals represent those known to be currently facing trials, or recently to have received sentences, on account of crimes related to freedom of expression crimes. The existence of such cases indicates a worrying trend of prosecutions which seek to suppress freedom of expression.

### A. Publishers

#### Ragıp Zarakolu

A trial began in May 2005 (now under A.301) at the Beyoğlu Court of First Instance

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<sup>6</sup> European Commission, “2005 Regular Report on Turkey’s Progress Towards Accession”, COM (2005) 561 final, 9 November 2005

No. 2 in Istanbul against Zarakolu for his publication of a Turkish translation of a book by Dora Sakayan entitled *Experiences of an Armenian Doctor: Garabet Hacheryan's Izmir Journal (Bir Ermeni Doktorun Yaşadıkları: Garabet Haçeryan'ın İzmir Güncesi)*; İstanbul: Belge 2005). Another case was initiated in March 2005, in which Zarakolu also faces charges for “insulting Atatürk’s memory” under Law No 5816 for publishing a Turkish translation of a book by George Jerjian entitled *The Truth Will Set Us Free: Armenians and Turks Reconciled (Gerçek bizi Özgür Kılacak)*; İstanbul: Belge 2004). His case was reheard on 19 April 2006 and has been adjourned again until 21<sup>st</sup> June 2006.

### Abdullah Yılmaz

The Beyoğlu Public Prosecutor has initiated a case against, chief editor of Literatür Publishing House under Article 301, after the publication of a translation of a book entitled *The fortunetellers of Smyrna [İzmir'in Falcıları]* by Greek author Mara Meimaridi. The book is alleged to denigrate the Turkish people. The case is due to be heard again on 26<sup>th</sup> July 2006.

### Fatih Taş

Taş, a 26-year-old student of Communications and Journalism at Istanbul University and the owner of Aram publishing house, is currently being tried under Article 301 because he published a Turkish translation of a book by the American academic John Tirman, entitled *The Spoils of War: the Human Cost of America's Arms Trade (Savaş Ganimetleri: Amerikan Silah Ticaretinin İnsan Bedeli)* (İstanbul: Aram, 2005)), that reportedly includes a map depicting a large section of Turkey as traditionally Kurdish and alleges that the Turkish military perpetrated a number of human rights abuses in the south-east of the country during the 1980s and 1990s. Taş states that the book contains nothing that has not previously been discussed in the Turkish Parliament or media, and was not intended to insult Turkey or Turkishness. The prosecutor reportedly demanded that each ‘insult’ in the book should be tried as a separate charge and asked for a prison sentence of ten and a half years. The next hearing of his case will take place on 14<sup>th</sup> June 2006 at the Court of First Instance No. 2 in Istanbul. In relation to other statements made in the book, Fatih Taş also faces charges under Articles 1/1 and 2 of Law 5816, which prohibits publicly insulting the memory of Atatürk.

In a separate case, on 9 December 2005 the Istanbul Court of First Instance No. 2 sentenced Taş to a prison term of six months for the publication of another book *They Say You are Missing (Kayıpsın Diyorlar)* by Ali Aydın. The book is a collection of articles and poems about a journalist who went missing during the 1990s. The

decision is being appealed.

### Ahmet Önal

Önal is the owner of Peri Publishing House and has faced 26 inquiries in connection with various books he has published. One of the books, *The Language of Pain: Woman (Acının Dili: Kadın)*, by M. Erol Coşkun, has led to his trial under Article 301 at the Beyoğlu Court of First Instance No. 2 because it is deemed to ‘denigrate the state security forces.’

Ahmet Önal was sentenced on 1<sup>st</sup> June 2006 to 13 months imprisonment by Beyoğlu Court of First Instance No. 2 on grounds that writer Evin Cicek’s Turkish language book “Tutkular ve Tutsaklar” (Passions and Captives) had content that “insulted Atatürk”, founder of modern Turkey. He had originally been sentenced to 12 months but this was increased to 18 months as the offence was committed in print. The length of his imprisonment was eventually reduced to 13 months because of good behaviour, but the custodial sentence remained as the court could not agree that he would not commit the offence again.

### Songül Özkan

Publisher Songül Özkan will be standing trial for publishing the book ‘Kurdish Rebellions’ by Ahmet Kahraman under TPC 312 (2). His next hearing is on 5<sup>th</sup> October 2006 at Beyoğlu 2<sup>nd</sup> Criminal Court of First instance.

## **B. Journalists**

### Emin Karaca

Doğan Özgüden, Emin Karaca and responsible editor Mehmet Emin Sert are appealing their conviction for articles entitled ‘30 years’ and ‘What the 30<sup>th</sup> year reminds’, both published by YAZIN magazine in April 2002. They are charged under penal code 159<sup>7</sup> with ‘insulting the military forces’. Mehmet Emin Sert was acquitted while Karaca was convicted. He received a five month prison sentence which was commuted to a fine and suspended. His appeal continues. Özgüden’s case continues. Emin Karaca wrote:

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7 Precursor to Article 301

‘at the dawn they arrive in helmets, boots and with arms. They sat on the country like a heavy rock...those who planned to come in helmets, boots and with arms and sit on the country like heavy rock...’

‘It turned out that they were not any different from Pinochet, Banzer, Videla, Garcia and Somoza, their colleagues in far way countries. Among other things they executed 49 people including one aged 17’

### Ragıp Zarakolu

He is also being tried (see above) for his article ‘What’s it got to do with you?’ published in his column ‘ALBATROSS!’ in Yeniden Ülkede Özgür Gündem. He is charged under A. 312 (2)<sup>8</sup> TPC with ‘instigating a part of the people having different social class, race, religion, sect or region to hatred or hostility against another part of the people in a way which is dangerous to public order’ The editor and owner of the newspaper Mehmet Çolak, and Ali Çelik Kasımoğulları respectively, are also being tried in Beyoğlu 2<sup>nd</sup> Criminal Court of First Instance.

### Hrant Dink

This journalist and editor of the Armenian-language weekly newspaper *Agos*, was given a six-month suspended prison sentence on 7 October 2005 by the Şişli Court of First Instance No. 2 in Istanbul for ‘denigrating Turkishness’ in an article he wrote on Armenian identity. According to the prosecutor in the case, Dink had written his article with the intention of denigrating Turkish national identity. The court suspended the sentence as the journalist had no previous convictions, on condition that he does not repeat the offence. The Court of Appeal overturned this decision on 24 February 2006. Since then, **the Supreme Court of Appeals Prosecutor’s Office** has said on 6<sup>th</sup> June 2006 that the decision to annul the suspension of the earlier six-month sentence was wrong because it had failed to analyze the article Dink wrote in its entirety, instead concentrating on a single sentence. They have said that Dink should be found not guilty of the charges against him.

He was acquitted by the Şanlıurfa Court of First Instance No. 3 on 9 February 2006 in another case brought against him under Article 301. He had been charged for a speech he had made during a conference organized by the Ngo, Organisation of Human Rights and Solidarity for Oppressed People, on 14 December 2002 entitled ‘Global Security, Terror and Human Rights, Multi-culturalism, Minorities and Human Rights’. During the speech he said:

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8 Precursor to Article 216

'I like the "I am honest I am industrious" part of the national oath and I say it out loud, As for the "I am Turk" part, I try to conceive it as "I am from Turkey"'

Murat Belge, İsmet Berkan, Hasan Cemal, Erol Katırcıoğlu and Haluk Şahin

These individuals faced their first hearing at the Bağcılar Court of First Instance No. 2 on 7 February 2006. All five are prominent journalists who write in mainstream Turkish daily newspapers (Milliyet and Radikal). They all face trial on charges under Article 301 in relation to newspaper articles they wrote about a judicial decision to ban a conference on the situation of Armenians during the Ottoman Empire. If convicted they each reportedly face prison terms of between six months and 10 years under Article 301, as well as on charges under Article 288 ('attempting to influence the judicial process').

Murat Belge apart, all the charges against the other four individuals were dropped in April 2006, when it was ruled that the case was subject to the statute of limitation due to the length of time between the alleged offence and the charges. However, it was deemed that the statute of limitation did not apply to the charges against Murat Belge. He was eventually acquitted of the charges on 8<sup>th</sup> June 2006. However, on 28 April 2006, the Bağcılar prosecutor's office issued an appeal against the decision to discontinue the trial against Belge's four co-defendants, and there is a possibility that the proceedings against them may restart.

*Murat Belge* wrote: 'when the one who is defined as serving out justice begins transgressing justice...The decision is so fatal'

*İsmet Berkan* wrote: 'We witnessed the judiciary stepping outside its authority...it is the worst attack so far on the academic quality of universities'

*Hasan Cemal* wrote: 'This decision has nothing to do with law and democracy... it's a decision that defies law and academic freedom...it is a blow to freedom of expression'

Abdurrahman Dilipak

He is a writer and journalist who has published 38 books and over 10,000 articles, writes a column in the daily newspaper, *Vakit*, and is well-known in Islamic religious circles. He was one of the founders of the human rights organization, Mazlum-Der and currently has 57 cases pending against him, seven of which are on charges under Article 301. Amongst his alleged 'crimes' are the statements voiced in articles such as 'My country is something other than this' ('Bir başkadır benim memleketim')

and ‘If we cannot trust justice’ (‘Yargıya güvenemeyeceğsek’). On 19<sup>th</sup> April 2006, the prosecutor in Bagcilar 2nd Criminal Court of First Instance asked the court to acquit him on charges under article 159 regarding “insulting the judiciary through the press” but maintain the charge under article 159 of publicly insulting the military forces of the state. His case continues.

### Birol Duru

Duru has been charged with ‘denigrating the security forces’ under Article 301 because he reported for the Dicle news agency the issuing of a press release by the Human Rights Association (İHD) Bingöl branch which stated that the security forces were burning forests in Bingöl and Tunceli.

### Erol Özkoray

He is a publishing director of *İdea Politika* magazine and faces a trial under Article 301 in connection with two articles which were posted on the magazine’s website; ‘The new barbarians and the Taliban in epaulettes’ (‘Yeni Barbarlar ve Apoletli Talibanlar’) and ‘What’s the point of the army?’ (‘Ordu ne işe yarar?’). Separate prosecutions against each article resulted in conviction, but the cases were combined when they were sent to the Court of Cassation. The next hearing of the case is due to take place on 2 June 2006 at the Şişli Court of Second Instance.

### Imprisoned journalists

According to The Solidarity Platform for Journalists in Detention, there are 9 journalists in prison as of December 2005; Memik, Horuz, Erol Zavar, Gülizar Kesici, Hatice Duman, Metin Yavuz, Mehmet Yayla, Mustafa Gök, Birol Duru, Goncagül Telek

## **C. Writers and Artists**

### Ferhat Tunç

His trial under Article 301 is to continue on 28<sup>th</sup> September 2006 at Beyoğlu 2nd Criminal Court of First Instance where he is charged with ‘denigrating the judicial organs of the State’ after a 2004 article entitled ‘A revolutionary Leyla and a song’ in *Özgür Gündem* newspaper in which he had commented critically on the

judiciary for the decision not to release Leyla Zana and another three former DEP parliamentarians on bail pending the outcome of their retrial. The newspaper's editor, Mehmet Çolak, is also prosecuted in connection with the same article.

### Zülküf Kışanak

On 22 December 2005, Istanbul Penal Court of First Instance No. 2 sentenced Kışanak to five months' imprisonment on charges of insulting the Turkish Republic in his book *How the Inheritance of Thousands of Years was Burned: Lost Villages (Bin Yılların Mirası Nasıl Yakıldı: Yitik Köyler)*. The sentence was commuted to a fine of 3000 YTL [c. US\$ 2,260].

## **D. Human Rights Defenders**

### Şeymus Ülek

Ülek, Vice-President of the Turkish human rights NGO Mazlum-Der, who along with Hrant Dink (see above), was cleared by the Şanlıurfa Court of First Instance No. 3 of charges under Article 159 of the previous Turkish Penal Code (now Article 301) for speeches he made during a conference organized by Mazlum-Der's Urfa branch on 14 December 2002 entitled 'Global Security, Terror and Human Rights, Multi-culturalism, Minorities and Human Rights'. Şeymus Ülek referred in his speech to the nation-building project of the Turkish Republic as it had affected, in particular, the southeastern area of the country. Hrant Dink discussed his own relationship to official conceptions of Turkish identity.

### Rıdvan Kızgın

Kızgın, the former president of the Bingöl branch of the Human Rights Association (İHD), faces charges under Article 301 for 'denigrating the state' following a letter he sent to the Turkish authorities which had on its letterhead the word 'Çewlik' (the Kurdish name for Bingöl). Kızgın has had over 47 cases opened against him since 2001.

### Eren Keskin

Eren Keskin, a lawyer and former president of the Istanbul branch of İHD, was sentenced to 10 months' imprisonment on 14 March 2006, which was commuted

to a fine of YTL 6000, under Article 301. She was convicted on account of a speech she made at a conference in Germany in 2002, which was deemed to be denigrating to the Turkish armed forces. In her speech, Eren Keskin allegedly accused Turkish soldiers of sexually abusing women.

## Part IV - Turkey's Obligations under International Law

### A. Fundamental Obligations

As a party to the ECHR and the ICCPR, Turkey is required to guarantee to all persons within its territory or subject to its jurisdiction the freedom and right to hold opinions and to seek, receive, and impart information and ideas of all kinds, orally, in print or art form or through other media, without the interference of public authorities.

Article 10 of the ECHR states,

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

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

Article 19 of the ICCPR states:

‘1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or

through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order, or of public health or morals.’

## B. International Jurisprudence

In *Sürek and Özdemir v. Turkey*<sup>9</sup>, the European Court of Human Rights (ECtHR) found that **the right to freedom of expression;**

‘constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual’s self-fulfillment. Subject to paragraph 2 of Article 10 [relating to lawful restrictions of this right], it is applicable not only to “information” or “ideas” that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no “democratic society”. **International** human rights law recognizes that freedom of expression is not an absolute right. There are permissible grounds for the imposition of lawful restrictions on the right to freedom of expression. The permissible restrictions, however, are to be strictly construed. Accordingly, any restriction on the exercise of the right to freedom of expression must be prescribed by law, and be necessary in a “democratic society” for one of the expressly set out grounds identified by human rights law which include, inter alia, “in the interests of national security... or public safety [and] for the prevention of disorder or crime”...’<sup>10</sup>

To qualify as a measure ‘prescribed by law’, any legal provision restricting the exercise of the right to freedom of expression must be accessible, unambiguous, narrowly drawn and precise enough so that individuals subject to the law can foresee whether a particular action is unlawful.

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9 23927/94;24277/94 [1999] ECHR 50 (8 July 1999)

10 Paragraph 57

Principle 1.1. of the Johannesburg Principles on National Security, Freedom of Expression and Access to Information<sup>11</sup>, states:

‘Prescribed by Law

(a) Any restriction on expression or information must be prescribed by law. The law must be accessible, unambiguous, drawn narrowly and with precision so as to enable individuals to foresee whether a particular action is unlawful.

(b) The law should provide for adequate safeguards against abuse, including prompt, full and effective judicial scrutiny of the validity of the restriction by and independent court or tribunal.’

The ECtHR expressed these principles in *Sunday Times v. United Kingdom*<sup>12</sup>;

‘in the Court’s opinion, the following are two of the requirements that flow from the expression “prescribed by law”. Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as “law” unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.’

In addition, any curtailment of the right to freedom of expression must both pursue one of the prescribed legitimate aims, and must be ‘deemed necessary in a democratic society’ to protect that legitimate aim, such as the prevention of imminent violence. In order to be ‘necessary in a democratic society’, the restriction must be proportionate, i.e. the restriction must do no more than is absolutely necessary to meet the legitimate aim.

The European Court of Human Rights has also stated that;

- i) the limits of acceptable criticism are broader as regards politicians than private individuals (*Lingens v Austria*<sup>13</sup>);
- ii) are wider with regard to government (*Castells v Spain*<sup>14</sup>); and

11 U.N. Doc. E/CN.4/1996/39 (1996)

12 6538/74 [1979] ECHR 1 (26 April 1979)

13 9815/82 [1986] ECHR 7 (8 July 1986)

14 11798/85 [1992] ECHR 48 (23 April 1992)

- iii) that the authorities of a democratic state must accept criticism even if provocative or insulting (*Özgür Gündem v Turkey*<sup>15</sup>).

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15 23144/93 [2000] ECHR 104 (16 March 2000)

## Part V - Analysis of the Prosecution

The bringing of this misconceived prosecution against Professors Oran and Kaboğlu is one of the clearest examples of a breach to the right to freedom of expression in Turkey in recent years.

### A. The Prosecution

The Indictment reads as a submission as to why the opinions and recommendations contained in the Minority report are wrong. In effect, this makes the prosecution a vehicle through which to publicly refute the academic opinions of the Advisory Group. This is a clear misuse of the criminal justice system.

The first, second and fourth reasons given in the indictment for the prosecution are merely disagreements of academic opinion and cannot form the basis of a proper indictment under the proposed articles. In this respect, the prosecution is entirely misconceived. These three points have no relationship whatsoever to the elements of the offence as defined under the material articles.

The third reason presents a more rational attempt to establish an offence under Article 301. It appears to allege that ‘declaring judgements of the Supreme Court have undermined democracy’ amounts to ‘insulting the Judiciary.’

#### 1. Judicial Insult?

It is appropriate to deal with this element of the prosecution at this point. No reasons are given by the prosecution as to why this amounts to an *insult* as opposed to a *criticism* (which is specifically protected under Article 301). Without any reason it is impossible to ascertain how considered comments on legal judgements could possibly amount to an offence, as the reasons do not present themselves to a rational onlooker.

## **B. Further reasons given for the prosecution**

Perhaps in tacit acknowledgement of the weakness of reasons already advanced by the prosecution, the indictment attempts to identify the precise basis for the prosecution which has quoted above.

The indictment therefore claims that the fulcrum of this offence is constituted by the following elements:

- i) approval of the report, despite the lack of quorum;
- ii) presenting the corrected report as if it had been validly approved by the Board;
- iii) announcing the report as if it were prepared by the Prime Ministry;

The indictment does not explain why these facts, if indeed true, satisfy the components of the offence. The presentation of the report, and whether the technical procedures had been followed, appears to be wholly irrelevant to the constituent elements of the stated alleged offences.

The content of the report, as opposed to the manner in which it emerged, is surely the appropriate basis for the prosecution. However, as can be seen from the content of the Report, there is nothing within it which denigrates state institutions, for instance language which denotes something over and above criticism or incites enmity or hatred.

In any event, it is alleged by the defendants that the report was validly adopted by the Advisory Board, in accordance with its stated procedures. As regards the presentation 'as if' the report was prepared by the Prime Ministry it is clear from the founding articles of the Advisory Board that the Board merely had to report to the Presidency.

## **C. Article 301**

In its particular assessment of Article 301 and specifically the defence of the ability to freely criticise, the indictment states:

'What is done in the report is not mere criticism or expression of opinion but something beyond. The fundamental elements of the Republic of Turkey have been targeted; and in doing so, the Report was presented as if it had

been prepared by the Prime Ministry,'

This explains little, if anything at all, as to why the opinions in the report go beyond mere criticism. The 'target' of the criticism is irrelevant, so long as it is criticism. If the report was presented as if by the Prime Ministry, which it clearly was not, this is also irrelevant.

The indictment does not point to one single element of the report to suggest persuasively that it seeks to denigrate or insult.

#### D. Article 216

As regards Article 216(1) the indictment cites the applicable law relating to inciting people to enmity and hatred. It states, *inter alia*:

- a) there must be a clear and present danger of a public disorder over and above that to be expected under normal public order. "Clear is something so evident that there is no doubt about the existence of danger whereas present refers to the closeness of the possibility of the creation of damage";
- b) to incite means "an explicit psychological pressure imposed on others to act in a certain way" or a behaviour, the object of which is to set a person into action and aims directly at psychological effect upon the will.

The specific elements which are required to establish the offence have been laid out above, on page 16 of the report. The indictment attempts to particularise and establish these elements with a single sentence:

'when the reactions and the indignation after its announcement are taken into account, all these elements exist in the ...Report prepared by the suspects.'

The alleged 'reactions and the indignation' are not particularised and neither is it established that a clear and present danger of extraordinary public disorder was generated. The indictment does not explain how the report incited such alleged danger, nor does it establish the requisite intention. The indictment does not identify which group is the target of the incitement, or establish it on the basis of social class, race, religion sect or regional differences.

## E. Breaches of Article 10 of the ECHR

To qualify as a measure ‘prescribed by law’ any legal provision restricting the exercise of the right to freedom of expression must be accessible and unambiguous, narrowly drawn and precise enough so that individuals subject to the law can foresee whether a particular action is unlawful.

The language of Article 301 is very wide indeed. To ‘insult’ is a term not defined further. However, under Article 301 to ‘insult’ cannot mean to criticize, as this right is also protected by Article 301. Then what is the residual meaning of ‘insult’? The residual meaning does not appear to be precise enough to ensure that citizens may regulate their conduct accordingly. It is difficult to see what behaviour is actually envisaged by Article 301 as to amount to an offence, if criticism is permitted. As stated above, Article 10 requires that any interference be prescribed by law in that it is clear what behaviour is prohibited. It appears that the terms of Article 301 breach this requirement.

Further, it is unclear what the legitimate aim of the article actually is. It is therefore questionable as to whether it satisfies one of the categories in Article 10 which legitimizes an interference; “national security, territorial integrity or public safety, the prevention of disorder or crime, the protection of health or morals, the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary”.

The European Union in its November 2005 Report on Turkey’s Progress to Accession<sup>16</sup> acknowledges the misuse of Article 301:

‘If the code continues to be interpreted in a restrictive manner, then it may need to be amended in order to safeguard freedom of expression in Turkey. In this context court proceedings based on Article 301 will be closely monitored.’

### 1. The Particular Prosecution

#### *Article 301*

In terms of the facts of this prosecution it is clear that the opinions expressed amount

<sup>16</sup> European Commission, “2005 Regular Report on Turkey’s Progress Towards Accession’, COM (2005) 561 final, 9 November 2005

to mere criticism of the approach to minorities by the state of Turkey. The case law of the ECtHR endows wide latitude to those who seek to criticise the state and the subject matter of such criticism can include provocative matters (see above).

In the particular circumstances of this prosecution it is difficult to see how this prosecution was a proportionate response to a legitimate aim.

#### *Article 216*

In principle the State may interfere with freedom of expression rights if it is ‘in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime...’

The aim of Article 216 appears to be to suppress expression which leads to the possibility of extraordinary public disorder.

However, there is nothing within the Minority Report which could possibly be construed as an incitement to violence nor is there any evidence that either defendant had any intention to do so. The indictment certainly does not refer to any particular passage in the report or any other evidence in order to prove such intention. Given that the Government itself charged the Advisory Board with the task of producing the Report, and it would not have been produced if it had not done so, it would seem difficult to establish an intention on the part of the professors or that the prosecution is a proportionate response.



## Part VI - Conclusions

- The May 2005 amendments enacted as part of the process to harmonize Turkish law with the standards of the Copenhagen Criteria and the EU *acquis communautaire* failed to effectively address a number of key articles which leaves open the possibility of their misuse.
- The provisions of Article 301 may constitute a breach of Article 10 ECHR *per se*. The threat of prosecution acts as a natural bar to individuals who may wish to engage in legitimate expression.
- The instant prosecution highlights the clear danger in retaining Article 301 because of its inherent capacity to be misused. Its wide and imprecise drafting allows it to be used as potential tool to suppressing legitimate expression.
- The instant prosecution appears to have originated from disgruntled members of the Advisory Board who merely disagreed with the adoption of the Minority Report by the Advisory Board.
- The instant prosecution appears to have had no purpose other than to attempt to deter legitimate discussion on the issue of minority rights in Turkey in the future and advance a personal view in an inappropriate forum.
- The swift acquittal of the Defendants by the Turkish judiciary is to be welcomed.
- The continuing prosecutions of those who impart their opinions, without inciting violence, indicate that the jurisprudence of the ECtHR is not being applied effectively by some local prosecutors.

## Recommendations

This report urges the state of Turkey to;

- Uphold its commitment to protecting the right to free expression by immediately repealing Article 301.
- Ensure more generally that all non-violent expressions of political opinion are free from censure, harassment or criminal prosecution.
- Ensure Judges and Prosecutors are aware of, and implement, the principles espoused by the European Court on Human Rights on freedom of expression.
- Introduce further training for the judiciary, prosecutors and state officials regarding international human rights standards.
- Ensure the Human Rights Advisory Board begins to function again immediately, continuing to act independent of political influence, without fear of prosecution or harassment.
- Launch an investigation by government inspectors as to how and why such a misconceived prosecution was initiated, particularly in light of the almost summary acquittal of the defendants, which amounted to a clear abuse of the criminal justice system.

This report urges the European Union to;

- Continue to closely monitor all trials under Article 301 and Article 216 as it has done in its progress reports on Turkey.
- Continue to exert its considerable influence on Turkey to maintain its progress to complying with the Copenhagen Criteria.

## Publications List

*Other materials available from the Kurdish Human Rights Project include:*

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