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## Strasbourg Observers

# ECtHR engages in dangerous “triple pirouette” to find criminal prosecution for media coverage of PKK statements did not violate Article 10

🕒 [October 14, 2019](#) [October 14, 2019](#) 👤 [Guest Blogger](#) 📁 [Freedom of Expression, Gürbüz and Bayar v. Turkey](#)

By *Ronan Ó Fathaigh and Dirk Voorhoof*

The European Court’s Second Section recently found that criminal proceedings against the owner and the editor of a newspaper for having published statements by the leader of a terrorist organisation were justified and did not violate the right to freedom of expression. The Court in *Gürbüz and Bayar v. Turkey* (<http://hudoc.echr.coe.int/eng?i=001-194948>) found that the newspaper’s article with statements by the leader of the PKK, Abdullah Öcalan, contained and implied a threat of resumption of violence. In its approach and finding no violation of freedom of expression under Article 10 ECHR, the Court itself made an assessment of the context and content of the article at issue, as the Turkish courts had restricted themselves to the finding of the illegal character of reproducing the statements of the PKK-leader as such, without further evaluating the necessity of the interference in a democratic society.

One can seriously question however whether it is the task of the ECtHR to regularise this omission by the domestic authorities. More substantially: by finding that the dissemination of one particular statement by Öcalan justified the criminal prosecution for journalistic reporting at the occasion of a ceasefire proposal in the Turkish-Kurdish conflict, the ECtHR neglects to verify the basic conditions of ‘intent’ and ‘clear and imminent danger’ in order to qualify the newspaper article at issue as an incitement to terrorist violence. The Court also showed insufficient attention to the role of journalism and media when reporting on matters of public interest and disseminating statements of others. These three turns by the Court were labelled by the dissent as a ‘triple pirouette’ that ‘ignore[d] fundamental aspects’ of ‘well-established’ Article 10 jurisprudence.

### Facts

The applicants in the case were the publisher and editor-in-chief of the Turkish daily newspaper *Ülkede Özgür Gündem*. Criminal proceedings were brought against them for publishing statements by Abdullah Öcalan, the head of the Kurdistan Workers’ Party (PKK), and Murat Karayılan, the president of Kongra-Gel, a PKK branch, in an article which appeared in the newspaper in September 2004, reporting on a ceasefire proposal by Kongra-Gel, and that organisation’s calls for an end to the armed conflict. Öcalan stated that he approved this proposal and called on the authorities to give immediate effect to the organisation’s claims, emphasising the need to develop Turkish-Kurdish

dialogue. If the dialogue and peace-process would fail, although this was not desirable, 2005 would necessarily be a year of transition to guerrilla warfare. Öcalan also called on Kurdish patriots to gather under the banner of Kongra-Gel. For his part, Karayılan emphasised that peace in the region would come about through recognition and respect for the rights of the Kurdish people and he called on the State to open up dialogue with the Kurdish representatives to find a democratic and peaceful solution to the Kurdish problem, stressing in particular, that he was willing to disarm if the conditions were right.

In 2007 the Istanbul Assize Court convicted Gürbüz and Bayar of the offence of publishing statements by a terrorist organisation, under the Prevention of Terrorism Act (Law no. 3713) and both were ordered to pay a fine. In 2012 the Court of Cassation held that the criminal proceedings against Gürbüz were time-barred, while Bayar’s sentence finally was suspended.

Relying on their right to freedom of expression under Article 10 ECHR Gürbüz and Bayar complained about the criminal proceedings brought against them.

## Judgment

First the ECtHR referred to the right of member states to defend themselves against terrorism and that a ‘fair balance’ needs to be struck between the individual’s fundamental right to freedom of expression and a democratic society’s legitimate right to protect itself against the activities of terrorist organisations. Next the ECtHR emphasised the principle that the mere fact of having published statements by terrorist organisations could not justify media professionals being systematically convicted by the courts without an analysis of the content of the contested articles or the context in which they were written (see *Gözel and Özer v. Turkey* (<https://hudoc.echr.coe.int/eng#%7B%22appno%22%3A%2231098/05%22%7D>)). The ECtHR also observed that virulent criticism on the government by a terrorist organisation cannot justify in itself a criminal conviction of the editors or journalists reporting such statements. However, the Court reiterated that when it came to statements which could be held to amount to hate speech or glorification of or incitement to violence, it analysed itself the contested articles, notwithstanding the fact that the reasons given by the courts for the convictions in question had been clearly insufficient. Also in the case at issue the ECtHR considered the motivation for the applicants’ conviction by the Turkish courts insufficient and even completely absent (‘insuffisante ou même absente’), and decided to analyse itself the content and context of the statements at issue.

The Court noted that the statements made by Karayılan were somewhat peaceful in nature; they did not seem such as to incite to the commission of violent acts, or their continuance. In contrast, although Öcalan indicated his support for Kongra-Gel’s ceasefire proposal, he nonetheless envisaged the possibility of recourse to violence if the authorities did not respond to the call for dialogue. The ECtHR focussed on a passage in the article that it considered as a barely veiled threat against the authorities, and an instruction to PKK-sympathisers and the armed members of the PKK. In particular it referred to Öcalan’s statement that ‘should the path of dialogue not develop, 2005 will necessarily be a year of transition to guerrilla warfare, even if this is not what they wish’. According to the Court this passage could be regarded as public provocation to commit a terrorist offence within the meaning of Article 5 of the Council of Europe Convention on the Prevention of Terrorism (CPT). It also referred to the fact that Öcalan called for a ‘gathering of patriots’ under the banner of the illegal organisation Kongra-Gel. Having regard to the nature, purpose and previous actions of the latter organisation, the ECtHR found that this appeal amounted to a message aimed at recruitment for terrorism within the meaning of Article 6 CPT.

In consequence, having regard to the identity of Öcalan as the imprisoned leader of the PKK, to the violent acts committed by the illegal organisation that he had led; to the content of the impugned passages in Öcalan’s statements, containing a threat and an instruction concerning possible acts of

violence to be committed by PKK members; and referring to the fragile context of a proposed ceasefire by Kongra-Gel in which these statements were made, the ECtHR came to the conclusion that Öcalan's statements, read as a whole, could be interpreted as incitement to or a call for the use of violence, armed resistance or an uprising. The ECtHR clarified this was so despite the fact that Öcalan's call to violence had been made only in a conditional form, namely should dialogue not be developed before 2005. In fact, these statements gave the public – and in particular the members of the PKK – the impression that, if the conditions put forward by Kongra-Gel were not met, recourse to violence would be necessary and justified in 2005.

Whilst it was true that the applicants as publisher and editor-in-chief had not been personally associated with the statements, they had, however, provided a forum to Öcalan and had enabled his statements to be disseminated. The ECtHR referred in this regard to its judgment in *Jersild v. Denmark* in which it stated that '[t]he punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so'. The Court also reiterated that the automatic repression against media professionals on the basis of Article 6 § 2 of the law no. 3713 without considering their aims or the public's right to be informed of other views on a conflict, could not be reconciled with the freedom to receive or impart information or ideas (see also *Ali Gürbüz v. Turkey* (<http://hudoc.echr.coe.int/eng?i=001-191706>) and *Gözel and Özer v. Turkey* (<http://hudoc.echr.coe.int/eng?i=001-99780>)).

However, given that the contested statements could effectively be interpreted as an incitement to violence, the Court is of the opinion that the applicants could not, in their respective capacities as owner and editor-in-chief of their newspaper, be exempted from all liability. According to the Court the right to impart information could not serve as an alibi or pretext for disseminating statements by terrorist groups. Moreover, the contested interference had not been disproportionate, given, firstly, the margin of appreciation enjoyed by the national authorities in such cases and, secondly, the statute-barring and suspended sentence from which the applicants had benefited respectively. Therefore, the Court, by six votes to one, held that the applicants' criminal prosecution on the basis Article 6 § 2 of the law n<sup>o</sup> 3713 on the prevention of terrorism has not violated Article 10 ECHR.

## Comment

The first point is that for over two decades, when considering whether a restriction on freedom of expression is consistent with Article 10, the Court has consistently applied a fundamental standard of review: the Court (a) 'has to determine whether the reasons adduced by the national authorities to justify it are relevant and sufficient', and (b) 'has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10'. It is a simple, but powerful, principle: the European Court must determine whether national courts provided sufficient reasons to justify a restriction of free expression, and the European Court must satisfy itself that national courts applied standards consistent with Article 10. Crucially, this is not a discretionary standard of review, but mandatory: the Court 'has to determine' and 'has to satisfy itself' of these elements.

And this is not some fringe principle, gathered from a hodgepodge of obscure admissibility decisions from the 1970s. It is a fundamental principle that has been applied consistently by the Court since *Jersild v. Denmark* (<http://hudoc.echr.coe.int/eng?i=001-57891>); and by the 17-judge Grand Chamber in many of its landmark Article 10 judgments (e.g., *Cumpăna and Mazăre v. Romania* (<http://hudoc.echr.coe.int/eng?i=001-67816>); *Von Hannover v Germany (No. 2)* (<http://hudoc.echr.coe.int/eng?i=001-109029>), *Morice v. France* (<http://hudoc.echr.coe.int/eng?i=001-154265>); *Delfi AS v. Estonia* (<http://hudoc.echr.coe.int/eng?i=001-155105>); and *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* (<http://hudoc.echr.coe.int/eng?i=001-175121>)). As such, where national courts do not provide

reasons which are relevant and sufficient; or do not apply standards which are in conformity with Article 10, it necessarily follows that there has been a violation of Article 10, as found recently in judgments such as *Kablis v. Russia* (<http://hudoc.echr.coe.int/eng?i=001-192769>) or *Brzeziński v. Poland* (<http://hudoc.echr.coe.int/eng?i=001-194958>) (see here (<https://strasbourgobservers.com/2019/05/17/kablis-v-russia-prior-restraint-of-online-campaigning-for-a-peaceful-but-unauthorised-demonstration-violated-article-10-echr/>) and here (<https://strasbourgobservers.com/2019/08/08/brzezinski-v-poland-fine-over-false-information-during-election-campaign-violated-article-10/>)). This approach was recently confirmed in *Aydemir and Karavil v. Turkey* (<http://hudoc.echr.coe.int/eng?i=001-186683>), where the Court observed that the domestic court's judgment 'does not contain any information as to the reasons why the applicants were found guilty of disseminating propaganda in support of the PKK. Besides, the first-instance court did not examine whether the text of the petition could be construed as encouraging violence, armed resistance or an uprising, or being capable of inciting to violence, which are essential elements to be taken into account'. The Court found that the reasons adduced by the national courts to justify the applicants' criminal conviction under the Prevention of Terrorism Law no. 3713 were not 'relevant and sufficient' for the purposes of Article 10 ECHR. Without analysing itself the text of the statements by the PKK the Court concluded that Article 10 was violated.

And yet, the majority in *Gürbüz and Bayar* have utterly upended this Article 10 standard of review, by holding that, in effect, it does not matter that the national courts did not adduce sufficient reasons justifying a newspaper editor's conviction under terrorism legislation; and it is completely irrelevant that the national courts did not even attempt to apply standards that were in conformity with Article 10 principles. The majority openly admit that the Turkish courts' reasoning was 'insufficient' and 'even completely absent'. But rather than simply finding a violation of Article 10 based on the total absence of the Article 10 principles applied by the Turkish courts, the Second Section majority did something quite extraordinary: it stated that 'the Court itself will analyse the statements', then concluded they constituted 'incitement to violence' (even though this was not even the offence involved), and there was thus no violation of Article 10.

The Court offered two authorities for its approach, namely paragraph 34 of *Falakaoğlu and Saygılı v. Turkey* (<http://hudoc.echr.coe.int/eng?i=001-79196>); and paragraph 28 of *Saygılı and Falakaoğlu v. Turkey (no. 2)* (<http://hudoc.echr.coe.int/eng?i=001-91357>); stating that in these cases the Court itself examined the articles at issue, even though the domestic court reasoning was 'manifestly insufficient'. But neither of these paragraphs, nor indeed, the entire judgments, say anything about the proposition the Court has authority to itself determine statements as incitement to violence where domestic courts fail to adduce reasons or apply standards in conformity with Article 10. And nowhere in these judgments does the Court say the domestic courts' reasoning was 'manifestly insufficient'. Indeed, in *Saygılı and Falakaoğlu (No. 2)*, the Turkish courts explicitly applied principles from Article 10 case law, including *Zana v. Turkey* (<http://hudoc.echr.coe.int/eng?i=001-58115>); and the European Court explicitly held that the 'reasons adduced by the authorities for the applicants' conviction are "relevant and sufficient"'. Nowhere in these judgments does the Court hold that it is departing from the fundamental principle of Article 10 review that the Court (a) 'has to determine whether the reasons adduced by the national authorities to justify it are relevant and sufficient', and (b) 'has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10'. Thus, the majority's approach in *Gürbüz and Bayar* is very questionable under Article 10 case law. The Court should simply have found a violation of Article 10.

Indeed, the *Gürbüz and Bayar* majority admitted that the Turkish courts imposed the convictions solely on the grounds that the newspaper had published statements by a terrorist organisation, and without carrying out any analysis of the article's content or context. The majority even admitted that there was authority directly on this point: in *Gözel and Özer v. Turkey* (<http://hudoc.echr.coe.int/eng?i=001-99780>) the Court unanimously found a violation of Article 10 over similar convictions

under the same provision of anti-terrorism legislation, holding that 'such automatic repression, without taking into account the objectives of media professionals or the right of the public to be informed of another view of a conflict situation, could not be reconciled with the freedom to receive or impart information or ideas'. And yet, the Second Section's majority decided that it would not apply *Gözel and Özer*.

Second, even if it would be legitimate to review the newspaper article's content, the majority arguably failed to apply the appropriate test for incitement to violence: the Court must be satisfied that (a) the 'intent' of the speaker was to incite hostility or violence; and (b) there was a 'clear and imminent danger' of violence resulting from the expression. Again, this is not some fringe test; it was unanimously applied by the Court only a few months ago in *Savva Terentyev v. Russia* (<http://hudoc.echr.coe.int/eng?i=001-185307>) (see [here \(https://strasbourgobservers.com/2018/10/09/savva-terentyev-v-russia-criminal-conviction-for-inciting-hatred-against-the-police-violated-a-bloggers-freedom-of-expression/\)](https://strasbourgobservers.com/2018/10/09/savva-terentyev-v-russia-criminal-conviction-for-inciting-hatred-against-the-police-violated-a-bloggers-freedom-of-expression/)); and in other judgments such as *Gül and Others v. Turkey* (<http://hudoc.echr.coe.int/eng?i=001-99186>) (para. 42); and *Kılıç and Eren v. Turkey* (<http://hudoc.echr.coe.int/eng?i=001-107591>) (para. 29). It is the test applied not only under Article 10 standards, but also under international human rights standards, as reiterated by the UN Special Rapporteur on freedom of expression (see [here \(https://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/67/357\)](https://ap.ohchr.org/documents/dpage_e.aspx?si=A/67/357)). And yet, the considerations of intent and imminent danger of violence are completely absent from the majority's judgment. It is difficult to see how the test would be satisfied, as the majority admit that the applicants had 'not personally associated themselves' with the statements.

Indeed, it was very relevant from a journalistic point to report on the differences of approach between the leaders of Kongra-Gel and PKK, without determining the newspaper itself had the intent to incite to violence by reproducing in particular the statements of Öcalan. The essence is that the Court showed insufficient attention to the role of journalism and media reporting by automatically considering that the dissemination of a statement coming from a terrorist group cannot serve as a pretext and is by itself to give 'a forum' to a terrorist organisation. This approach completely undercuts the *Jersild* principle that seeks to protect media interviewers, as also in the *Jersild* case the interviewed Greenjackets manifestly incited to hatred and violence, but the ECTHR in that landmark judgment rightly found that the intention of the journalist was not to incite to hatred or violence, but to report on an important issue of public interest. It is entirely unclear why the majority in *Gurbuz and Bayar* did not consider itself bound by the seminal *Jersild* judgment, which has been so central to Article 10 jurisprudence for over two decades, providing an important shield to journalists across Council of Europe member states, where prosecutors have sought to target the media for critical reporting on matters of public interest.

Importantly, it must be noted that there was clearly some unease within the Second Section on the approach taken. The concurring opinion by Judge Spano and Judge Bårdsen stressed the importance of 'subsidiarity', but then, in a complete about-turn, held that where it is 'manifestly clear' that content is incitement to violence or hate speech, the Court can adopt the majority's approach. But the concurring opinion provided no authority for such a principle, and it smacks of the type of language used in heavily criticised German legislation (e.g., [here \(https://www.hrw.org/news/2018/02/14/germany-flawed-social-media-law\)](https://www.hrw.org/news/2018/02/14/germany-flawed-social-media-law) and [here \(https://www.article19.org/wp-content/uploads/2017/09/170901-Legal-Analysis-German-NetzDG-Act.pdf\)](https://www.article19.org/wp-content/uploads/2017/09/170901-Legal-Analysis-German-NetzDG-Act.pdf)). The concurring opinion is clearly aware of the danger in such an approach, and stated that in 'borderline' cases, the Court should not 'come to the rescue' where domestic court reasoning is deficient under Article 10. But again, the concurring opinion provides no authority for such a limiting principle. Finally, there was one dissenting opinion by Judge Pavli, built heavily around Article 10 case law, and finding a violation of Article 10. The opinion criticises the majority opinion for 'revers[ing] the fundamental logic' of Article 10 review, and that the approach invites national courts to 'not take the trouble' to carry out careful Article 10 review. And even if such an approach were adopted, the dissenting opinion robustly criticises the

deficient Article 10 analysis applied by the majority under the Court’s case law on incitement to violence. Judge Pavli concluded that the majority’s opinion was based on a ‘triple pirouette’ that ‘ignores fundamental aspects of our well-established jurisprudence’.

3 thoughts on “**ECtHR engages in dangerous “triple pirouette” to find criminal prosecution for media coverage of PKK statements did not violate Article 10**”