



COLUMBIA LAW SCHOOL

HUMAN RIGHTS CLINIC

Trial Monitoring of People v. Cansu Pişkin

(Turkey 2019)

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*Stephen J. Rapp
Former U.S. Ambassador-at-Large
for War Crimes Issues*

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

ABOUT THE AUTHORS

The **Columbia Law School Human Rights Clinic** works to advance human rights around the world and to train the next generation of strategic advocates for social justice. The clinic works in partnership with civil society organizations and communities to carry out human rights investigations, legal and policy analysis, litigation, report-writing and advocacy.

Ambassador Stephen J. Rapp is a Fellow at the United States Holocaust Memorial Museum's Center for Prevention of Genocide. He also serves as Chair of the Commission for International Justice & Accountability (CIJA). From 2009 to 2015, he was Ambassador-at-Large heading the Office of Global Criminal Justice in the US State Department. Rapp was the Prosecutor of the Special Court for Sierra Leone from 2007 to 2009 where he led the prosecution of former Liberian President Charles Taylor. From 2001 to 2007, he served as Senior Trial Attorney and Chief of Prosecutions at the International Criminal Tribunal for Rwanda, where he headed the trial team that achieved the first convictions in history of leaders of the mass media for the crime of direct and public incitement to commit genocide. Before becoming an international prosecutor, he was the United States Attorney for the Northern District of Iowa from 1993 to 2001.

ABOUT THE CLOONEY FOUNDATION FOR JUSTICE'S TRIALWATCH INITIATIVE

TrialWatch is an initiative of the **Clooney Foundation for Justice** focused on monitoring and responding to trials around the world that pose a high risk of human rights violations. **TrialWatch** is global in scope and focused on trials targeting journalists, LGBTQ persons, women and girls, religious minorities, and human rights defenders. It works to expose injustice and rally support to secure justice for defendants whose rights have been violated.

EXECUTIVE SUMMARY



Between March and May 2019, TrialWatch monitors under the supervision of the Columbia Law School Human Rights Clinic monitored the trial of Cansu Pişkin, a journalist for the Turkish daily paper, Evrensel, in Istanbul, Turkey. Pişkin was charged with “making a public servant into a target for terrorist organizations” in violation of Section 6(1) of Law No. 3713, otherwise known as the Anti-Terror Law, for publishing the prosecutor’s name in her April 5, 2018 article, “Special Prosecutor for the Bosphorus Students.” On May 7, 2019, the Court convicted Pişkin and sentenced her to 10 months’ imprisonment (with the sentence pronouncement deferred for a period of five years).

Ambassador Stephen J. Rapp assigned this trial a grade of D.

Grade: D

BACKGROUND INFORMATION



A. POLITICAL & LEGAL CONTEXT

Turkey's record on freedom of expression, criticized by domestic and international organizations for years, has continued to decline since the 2016 attempted coup, with the government routinely arresting and prosecuting journalists and other critics.¹ Journalists in particular have been targeted for their work in reporting on and sharing information about government actions, generally charged with terrorism-related offenses under Turkey's sweeping anti-terror laws.

In 2018, the Committee to Protect Journalists called Turkey the world's "worst jailor of journalists," with at least 68 journalists jailed for their work and, for the third year in a row, with every journalist imprisoned in Turkey facing anti-state charges.² While the exact number of journalists in prison in Turkey is unconfirmed, according to the International Press Institute (IPI), as of May 2019, 139 journalists were in prison (counting both those jailed for their work and those jailed on other grounds);³ the Turkish free expression group P24, which monitors and documents trials involving freedom of speech, estimates that 138 journalists are currently in prison.⁴ Many more have been arrested or charged but not imprisoned; in 2017, the Office of the High Commissioner for Human Rights (OHCHR) received reports of the arrest and detention of approximately 300 journalists "on the grounds that their publications contained apologist sentiments regarding terrorism or other 'verbal act offences' or for 'membership' in terrorist organizations."⁵

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- ¹ See generally Article 19, Turkey, <https://www.article19.org/region/turkey/>. Beyond the arrest and prosecution of journalists, the Turkish government has restricted freedom of expression for the public more generally by ordering media blackouts and blocking websites. According to the PEN International, media outlets that do not overtly support the government "face regular legal harassment that drains finances through fines, legal fees and trumped-up tax penalties." PEN International, I Subscribe Campaign, available at <https://pen-international.org/print/6615>; see also MLSA, Justice Monitoring Report: Freedom of Expression Trials in Turkey June-December 2018 (2018), available at https://freeturkeyjournalists.ipi.media/wp-content/uploads/2019/01/MLSA_IPI_Trials_Turkey_Jan2019.pdf. And Turkey made 45 percent of global requests to Twitter to remove online content in the first half of 2017. Human Rights Watch, *Turkey: Events of 2017* (2017), available at <https://www.hrw.org/world-report/2018/country-chapters/turkey>.
- ² Committee to Project Journalists, Report, "Hundreds of journalists jailed globally becomes the new normal," Dec. 31, 2018, available at <https://cpj.org/reports/2018/12/journalists-jailed-imprisoned-turkey-china-egypt-saudi-arabia.php>.
- ³ Free Turkey Journalists, home page, available at <https://freeturkeyjournalists.ipi.media/>.
- ⁴ P24, Expression Interrupted, "Journalists in Jail," available at <https://expressioninterrupted.com/census/>.
- ⁵ Office of the United Nations High Commissioner for Human Rights, Report on the impact of the state of emergency on human rights in Turkey, including an update on the South-East, para. 11 (March 2018), available at https://www.ohchr.org/Documents/Countries/TR/2018-03-19_Second_OHCHR_Turkey_Report.pdf.

The Turkish government has frequently used anti-terrorism legislation to target its critics, including journalists; for example, as of July 2018, 57 media workers were on trial for “terrorist propaganda.”⁶ According to a report from Turkish organization Media and Law Studies Association (MLSA) in partnership with IPI and Friedrich Naumann Foundation for Freedom, of 90 freedom of expression cases monitored in 2018, 72% involved terrorism-related crimes.⁷

These prosecutions of journalists and critics are taking place in a climate of diminishing judicial independence, where the government has targeted the judiciary by dismissing or arresting numerous prosecutors and judges in recent years.⁸ After the 2016 attempted coup, 20-25 percent of Turkey’s judges and prosecutors were dismissed, including two members of the constitutional court.⁹ Although the government claimed to have only dismissed judges associated with the Gülen movement (which the Turkish government considers responsible for the attempted coup), civil society organizations report an increased politicization of Turkey’s judiciary.¹⁰ The legal profession more generally has been targeted. As of 2018, according to OHCHR, “570 lawyers had been arrested, 1,480 faced some kind of prosecution, and 79 were sentenced to long-term imprisonment. Moreover, approximately 34 bar associations were shut down on the ground of alleged affiliation to a terrorist organization.”¹¹

1. Turkish Laws Impacting Freedom of Expression and the Right to a Fair Trial

The Turkish Constitution recognizes fundamental rights including freedom of expression and opinion. Article 25 provides for freedom of thought and opinion, and Article 26 guarantees freedom of expression, which the Constitution defines as “the

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- ⁶ Reporters without Borders, “Spate of trials in Turkey on ‘terrorist propaganda’ charges,” Sept. 6, 2018, available at <https://rsf.org/en/news/spate-trials-turkey-terrorist-propaganda-charges>.
- ⁷ MLSA, Justice Monitoring Report: Freedom of Expression Trials in Turkey June-December 2018 (2018), available at <https://freeturkeyjournalists.ipi.media/>.
- ⁸ See International Commission of Jurists, “Turkey: Dismissal of judges and prosecutors tainted by unfairness, says ICJ,” Feb. 4, 2019, available at <https://www.icj.org/turkey-dismissal-of-judges-and-prosecutors-tainted-by-unfairness-says-icj/>; Reuters, “Turkey sacks 107 judges, prosecutors over links to failed coup: media,” May 5, 2017, available at <https://www.reuters.com/article/us-turkey-security-court/turkey-sacks-107-judges-prosecutors-over-links-to-failed-coup-media-idUSKBN1811P4>; Article 19, Turkey, <https://www.article19.org/region/turkey/>.
- ⁹ The Economist, “Turkey’s purges are crippling its justice system,” (May 20, 2017), available at <https://www.economist.com/europe/2017/05/20/turkeys-purges-are-crippling-its-justice-system>.
- ¹⁰ Financial Times, “Turkey says purge of judiciary over after sacking 4,000,” (May 26, 2018), available at <https://www.ft.com/content/0af6ebc0-421d-11e7-82b6-896b95f30f58>; Article 19, XPA (Expression Agenda metric) 2017 country profile: Turkey, Nov. 30, 2017, <https://www.article19.org/resources/xpa-2017-country-profile-turkey/>.
- ¹¹ Office of the United Nations High Commissioner for Human Rights, Report on the impact of the state of emergency on human rights in Turkey, including an update on the South-East, para. 9 (March 2018), available at https://www.ohchr.org/Documents/Countries/TR/2018-03_19_Second_OHCHR_Turkey_Report.pdf.

right to express and disseminate his/her thoughts and opinions by speech, in writing or in pictures or through other media, individually or collectively . . . [which includes] the liberty of receiving or imparting information or ideas without interference by official authorities.”¹²

However, these rights are also restricted by the Constitution. As amended in 2001, Article 26 provides that:

The exercise of these freedoms may be restricted for the purposes of national security, public order, public safety, safeguarding the basic characteristics of the Republic and the indivisible integrity of the State with its territory and nation, preventing crime, punishing offenders, withholding information duly classified as a state secret, protecting the reputation or rights and private and family life of others, or protecting professional secrets as prescribed by law, or ensuring the proper functioning of the judiciary.¹³

In April 2017, Turkey further amended Article 15 of its Constitution to provide that “[i]n times of war, mobilization, a state of emergency, the exercise of fundamental rights and freedoms may be partially or entirely suspended, or measures derogating the guarantees embodied in the Constitution may be taken to the extent required by the exigencies of the situation, as long as obligations under international law are not violated.”¹⁴

Turkey’s Anti-Terror Law, Law No. 3713 of 1991,¹⁵ criminalizes propaganda for a terrorist organization, and Article 6(1) of the law provides:

Those who announce or publish that a crime will be committed by terrorist organisations against persons, in a way that makes possible that these persons can be identified, whether or not by specifying their names and identities, or those who disclose or publish the identities of state officials that were assigned in fight against terrorism, or those who mark persons as targets in the same manner shall be punished with imprisonment from one to three years.¹⁶

Similarly, under Article 7 of the Anti-Terror Law “making propaganda for a terrorist organisation shall be punished with imprisonment from one to five years, [and]

¹² Constitution of the Republic of Turkey, arts. 25–26 (1982) (hereinafter “Constitution of Turkey”), https://global.tbmm.gov.tr/docs/constitution_en.pdf.

¹³ Constitution of Turkey art. 26.

¹⁴ Constitution of Turkey art. 15.

¹⁵ Law No. 3713 (1991), available at <https://www.legislationline.org/topics/country/50/topic/5>.

¹⁶ *Id.* art. 6(1).

[i]f this crime is committed through means of mass media, the penalty shall be aggravated by one half.”¹⁷

2. Turkey in the European and International Systems

Turkey is a state party to the major international human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR) and its optional protocols, the International Covenant on Economic, Social, and Cultural Rights (ICESCR), and the Convention Against Torture (CAT).¹⁸ UN bodies reviewing Turkey’s human rights record in recent years have criticized the government for its crackdown on journalists through the expansive use of anti-terrorism laws. For example, in 2017, following a November 2016 visit to Turkey, the UN Special Rapporteur on freedom of opinion and expression urged the Turkish government’s “review and revision of the emergency decrees” as well as other counter-terrorism and defamation legislation to bring these laws into compliance with international human rights standards¹⁹ on the ground that the vague language in Turkey’s counter-terrorism laws “allows for subjective interpretation without adequate judicial oversight,” resulting in the use of those laws to target advocates for lawfully exercising their freedom of expression.²⁰

Similarly, in its 2012 review of Turkey, the UN Human Rights Committee also expressed concern that provisions of the Anti-Terror Law are incompatible with the ICCPR because of (a) the vague definition of “terrorism,” (b) its restrictions on due process, and (c) the disproportionate targeting of “human rights defenders, lawyers, journalists and even children” under the Anti-Terror Law.²¹ In light of these findings, the Human Rights Committee recommended that Turkey limit its definition of “terrorism” to “offences that are indisputably terrorist offences” and ensure that prosecutions under the Anti-Terror law provide the full guarantees of the right to due process.²²

Turkey has also ratified the European Convention on Human Rights (ECHR).²³ Many of the cases against Turkey before the European Court of Human Rights allege a

¹⁷ *Id.* art. 7(2).

¹⁸ OHCHR, Ratification Status by Country: Turkey, *available at* https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=179&Lang=EN.

¹⁹ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression on his mission to Turkey, A/HRC/35/22/Add.3., paras. 80–85 (June 2017), *available at* <https://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/Annual.aspx>.

²⁰ *Id.* para. 17.

²¹ U.N. Human Rights Committee, Concluding observations on the initial report of Turkey adopted by the Committee at its 106th session (15 October - 2 November 2012), CCPR/C/TUR/CO/1, para. 16.

²² *Id.*

²³ European Court of Human Rights, Turkey, (May 2019), *available at* https://www.echr.coe.int/Documents/CP_Turkey_ENG.pdf.

violation of the right to freedom of expression (Article 10) and/or the right to a fair trial (Article 6).²⁴

B. THE TRIAL: Cansu Pişkin

Cansu Pişkin was criminally charged with “ma[king] a public servant into a target for terrorist organizations” in violation of Section 6(1) of the Anti-Terror Law after she published an online news article²⁵ on April 5, 2018 criticizing the government for its prosecution of student protesters. Violations of section 6(1) are punishable by up to three years in prison.

Pişkin’s article, entitled “Special Prosecutor for Boğaziçi University Students,” concerned the decision to change the prosecutor responsible for a case against student protesters. The students were arrested for participating in a demonstration calling for peace and against Turkish military activities in Syria.²⁶ In her article, Pişkin included the name of the new prosecutor put in charge of the case right before it went to trial.

As set out in the Pişkin indictment, to constitute a violation of Article 6(1), the publication of a public official’s identity must have been done for the purpose of targeting that individual, and such cases should be analyzed on a case-by-case basis, considering factors such as the official’s “position and role in the investigation” and whether they are a senior official.²⁷ In the indictment, the prosecutor stated that Pişkin violated this provision when she listed the prosecutor’s name in her article and emphasized the fact that the article was posted online.²⁸

Ms. Pişkin contended that the name of the prosecutor was a matter of public record and was already in the public forum prior to the publication of her article.

²⁴ *Id.* at 10-12; 15-19.

²⁵ Pişkin’s article is available at <https://www.evrensel.net/haber/349437/bogazicililere-ozel-savci>.

²⁶ Bianet, “Journalist Cansu Pişkin Sentenced to 10 Months in Prison,” May 8, 2019, *available at* <https://bianet.org/english/freedom-of-expression/208260-journalist-cansu-piskin-sentenced-to-10-months-in-prison>; Committee to Protect Journalists, “Journalist sentenced to 10 months in prison,” May 9, 2019, *available at* <https://cpj.org/blog/2019/05/turkey-crackdown-chronicle-week-of-may-5-2019.php>.

²⁷ Annex A, People v. Pişkin Indictment at 2.

²⁸ *Id.*

TRIAL PROCEEDINGS

Criminal proceedings against Pişkin started on March 6, 2019 at the 36th Heavy Penal Court in Istanbul. This was the first of three hearings (March 6, March 25, and May 7, 2019), all of which were attended by TrialWatch monitors either from or supervised by the Columbia Law School Human Rights Clinic. Pişkin was not detained and was represented. The case was presided over by a panel of three judges.

March 6, 2019 Hearing

The first hearing began at 9:10am on March 6, 2019 in Istanbul. The monitoring team was able to enter and provide a letter of accreditation to Pişkin's attorney, who presented it to the court.

An attorney for Cansu Pişkin began the hearing by arguing that the case should be dropped for lack of jurisdiction. Although the case was brought under the Anti-Terror Law, defense counsel argued that Turkey's Press Law²⁹ (which generally governs criminal cases brought on the basis of journalistic material) limited the prosecution's ability to file charges based on articles published online where the statute of limitations had passed. He noted that a high court in Ankara had also found it lacked jurisdiction over a case where the statute of limitations had run before the charges were brought (based on when the article was published) and noted that given this precedent and the fact that the charges were not brought promptly against Pişkin, the charges should be dropped.³⁰ The court briefly had the courtroom vacated to consider the argument then reconvened and informed the parties and the audience that because the article was published online, the charges had been brought in a timely matter and the prosecution would continue.

The defense attorneys next argued that the court should not have jurisdiction over the case as cases covered by the Press Law are not handled by the 36th Heavy Penalty Court. After hearing from the prosecutor, the judge rejected the defense argument, agreeing with the prosecutor that this was a terrorism case and so properly heard by the 36th Heavy Penalty Court. The judge then provided a summary of the case and charges and stated that Pişkin was understood to have committed the crime of disclosing the name of a higher anti-terrorism official. The judge then asked Pişkin if she

²⁹ Law No: 5187, *available at* <http://www.lawsturkey.com/law/press-law-5187>.

³⁰ Article 26 of the Press Law states: "It is essential that cases of crimes entailing the use of printed matter or other crimes mentioned in this law should be opened within a period of two months for daily periodicals and six months for other printed matter." Pişkin was charged in December 2018; her article was released in April 2018 so her attorneys argued that the statute of limitations had run before the prosecution was brought.

was prepared to submit her defense. She asked for more time and the next hearing was set for March 25, 2019.

March 25, 2019 Hearing

Pişkin and her attorneys presented their defense at the second hearing, at the outset of which the Court informed Pişkin of her rights—namely the right to silence and the right to counsel. She affirmed that she understood her rights and was ready to proceed with the case, presenting her defense with her attorneys.

Pişkin and her attorneys maintained that she included the name of the prosecutor in her article because the identity of the prosecutor was newsworthy, not with any criminal intent. In particular, Pişkin noted (a) the fact that the investigation’s prosecutor was changed on the day that Boğaziçi students were brought to the court was newsworthy, especially given the public interest in the case and the students’ long pre-trial detention; and (b) that this prosecutor had previously defined the People’s Democratic Party (HDP) as a political party that acts under directions from a terrorist organization, a remark that conflicts with a prosecutor’s professional principles.

Pişkin’s attorneys argued both that she had no criminal intent to make the prosecutor a target and also that the name of the prosecutor had been previously published by other media outlets with no ramifications for the other journalists. Further, the attorneys argued that a Public Prosecutor is not a public official under Article 6(1) of the Anti-Terror Law so the charges should be dismissed.

Finally, Pişkin’s attorneys noted that the court should not have jurisdiction over this case at all because their review of the case file disclosed that the Office of the Prosecution had previously decided not to pursue the prosecution. Under Article 172 of the Code of Criminal Procedure, the Public Prosecutor may drop a prosecution if no criminal offense was committed, if there was insufficient evidence or if the right to prosecute no longer exists.³¹ This decision can be objected to and the prosecution reopened if new evidence or facts emerge. In this case, however, no such objection was lodged but the prosecution nevertheless proceeded with the indictment after an earlier decision to drop the case.³² The judge, however, said the Chief Prosecutor had discretion to decide whether or not to prosecute.

³¹ Feridun Yenisey, *Criminal Procedure Law in Turkey* at 53 (May 2015), <https://law.ku.edu/sites/law.ku.edu/files/docs/istanbul/criminal-procedure-istanbul-2015.pdf>.

³² *Id.* at 54.

May 7, 2019 Hearing

At the final hearing, the prosecution and defense recommitted to their prior legal positions. Cansu Pişkin's attorney said:

The elements of the crime are not realized. Although an immediate acquittal decision should have been given, it was not done. Judges and prosecutors are not public officials. It is clear that by public officials [the Anti-Terror law] meant security forces working on the fight against terrorism. The moral element of the alleged crime depends on the existence of intent. The action must be taken with the intention to mark someone as target. With respect to the defendant, neither a specific intent nor a general intent can be attributed. In the *Surek v. Turkey* judgment, the ECHR [European Court of Human Rights] found that the right to freedom of expression and thought was violated. The Public Prosecutor . . . mentioned in the news is a publicly known prosecutor. He worked as a investigating prosecutor in many of the cases that concerned public interest. No action was taken when his name appeared in *Takvim* and several others [newspapers] but an investigation was started only when his name appeared in *Evrensel*. This shook the trust for law.³³

The Court asked Cansu Pişkin for her final words before the verdict was pronounced in court; she said, "Journalism is not a crime." The Court then found Pişkin guilty of the terrorism charge ("making a public servant into a target for terrorist organizations") and sentenced her to ten months' imprisonment. The sentence imposition was deferred, pursuant to Article 231(11) of the Criminal Code of Procedure, whereby Pişkin will be subject to five years of monitoring and will not be imprisoned unless she "deliberately commits a crime within the monitoring period."³⁴

In interviews with TrialWatch, advocates observed that this monitoring period (essentially, a suspended sentence) is a way to silence journalists and activists as publication of any future article considered problematic by the government could be construed as a new intentional crime.³⁵ Indeed, as the Office of the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media

³³ See Annex B Hearing Record May 7, 2019.

³⁴ See Annex B Hearing Record May 7, 2019.

³⁵ Trial Monitor Interviews, March 2019. Similarly, Front Line Defenders have observed that this tactic has been used in the Academics for Peace trials: "since having the verdicts in their criminal records, the academics lose their status as civil servants and with it, the ability to work as scholars at Turkish universities." Front Line Defenders, "Member of Academics for Peace, Zübeyde Füsün Üstel, due to begin prison sentence," April 30, 2019, available at <https://www.frontlinedefenders.org/en/case/member-academics-peace-z%C3%BCbeyde-f%C3%BCsun-%C3%BCstel-due-begin-prison-sentence>.

noted, “Article 231 can serve as a tool to encourage self-censorship,” and journalists sentenced under this article must waive their appeal or else face imprisonment.³⁶

³⁶ Office of the OSCE Representative on Freedom of the Media, Table of imprisoned journalists and examples of legislative restrictions on freedom of expression and media freedom in Turkey, *available at* <https://www.osce.org/fom/173036?download=true>.



A. THE MONITORING PHASE

The Columbia Law School Human Rights Clinic or their local partners monitored all three hearings. In advance of monitoring mission, the Clinic informed one of the defense attorneys of its intention to monitor the case and procured the charge sheet from local advocates also following the case. The Clinic prepared a background memorandum for the monitors outlining key information on human rights and freedom of expression in Turkey, the judicial system and laws at issue in this case, the right to a fair trial under Turkish law, and laws impacting freedom of expression and national security laws in Turkey. This report also included information on the trial, including the charges against the defendant and the facts of the case.

None of the monitors experienced any impediments to their entry into the courtroom. The Columbia team provided a letter of accreditation to the Court. In the first hearing, the Columbia monitors were accompanied by a professional interpreter who was permitted to provide whisper translation to the team during the proceedings. The Columbia team worked with professional interpreters to translate the indictment and court transcripts, included in this report as Annexes.

All monitors used a standardized TrialWatch questionnaire to record and track what transpired in court and the degree to which the defendant's fair trial rights were respected in the proceedings. These questions requested factual information about all stages of the proceedings (pretrial through sentencing). The monitors' responses, as well as notes regarding the proceedings, were shared with Ambassador Stephen Rapp, the member of the TrialWatch Experts Panel responsible for evaluating the fairness of the trial. While in Turkey monitoring the first hearing, the trial monitoring team also met with defense counsel, defendant Cansu Pişkin, and local attorneys and human rights advocates following freedom of expression cases in Turkey. Notes from these meetings were provided to the expert for this fairness report.

B. THE ASSESSMENT PHASE

1. The Grading Methodology

To evaluate the trial's fairness and arrive at a grade, Ambassador Rapp reviewed responses to the standardized questionnaire (collected via the CFJ TrialWatch App), notes taken during the proceedings and related meetings, and court documents related to the case.

These materials provided the expert with a factual record to review in order to evaluate the trial's fairness under human rights law. The expert then evaluated the trial against the following components of the right to a fair trial: the right to be presumed innocent; right to be informed of the charges; fitness to plead; the right to interpretation; the right against double jeopardy; the right to a speedy trial; the right to be tried by a competent, independent and impartial tribunal established by law; the right to counsel; the right to adequate time and facilities to prepare a defense; the right to a public hearing; the right to be tried in one's presence; the right not to incriminate oneself; the right to call and examine witnesses; the right to fairness; and the right to appeal, including the right to a public, reasoned judgment.

A grade was then assigned to the trial reflecting the expert's view of whether and the extent to which the trial complied with relevant international human rights law, taking into account, *inter alia*:

- The severity of the violation(s) that occurred;
- Whether the violation(s) affected the outcome of the trial;
- Whether the charges were brought in whole or in part for improper motives, including political motives, economic motives, discrimination, such as on the basis of "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,"³⁷ or retaliation for human rights advocacy (even if the defendant was ultimately acquitted);
- The extent of the harm related to the charges (including but not limited to whether the defendant was unjustifiably convicted and, if so, the sentence imposed; whether the defendant was kept in unjustified pre-trial detention, even if they were ultimately acquitted at trial; whether the defendant was mistreated in connection with the charges or trial; and/or the extent to which the defendant's reputation was harmed by virtue of the bringing of charges); and

³⁷ ICCPR art. 26.

- The compatibility of the law and procedure pursuant to which the defendant was prosecuted with international human rights law.

2. Fair Trial Analysis

This is a proceeding at which many of rights of the accused person appear to have been protected but in the end lacked fundamental fairness. The trial was public, the accused was represented by four defense counsel, an adjournment of 19 days was granted to give the accused more time to prepare for trial, and a further 42 days for her attorneys to make legal arguments before pronouncement of the verdict. The defense was accorded the opportunity to raise legal and procedural objections each of which were respectfully denied by the judges, albeit with little reasoned explanation. The accused was informed of the charges, the trial was conducted in her presence and her language, and proceeded only after she stated that she was ready.

However, these appearances count for little if she was prosecuted under a statute that was applied so as to suppress free expression in violation of Article 10 of the European Convention on Human Rights (ECHR) and if she was convicted without proof of an essential element of the crime as provided by the relevant statute.

As noted above, UN bodies have found that Turkish authorities have made expansive use of anti-terrorism laws to crack down on journalists and to target those of who are “lawfully exercising their rights to free expression.” As argued by attorneys for the accused, the name of the public prosecutor which she published was publicly known and appeared in *Takvim* and other newspapers. Her publication related to the highly-newsworthy prosecution of Bogazici university students for distributing “Afrin delights” sweets in protest against the Turkish government’s offensive against Kurdish-held Afrin, Syria. The defendant herself reported that the first public prosecutor of the cases against the students was replaced by a second prosecutor who had publicly described the Peoples’ Democratic Party (HDP), the third largest in the Turkish parliament and one significantly supported by Turkish citizens of Kurdish ethnicity, as a party “which does politics under directions of a terrorist organization.” This was highly relevant to the public’s right to information about the independence and possible bias of a judicial official responsible for pursuing criminal violations of the law.

In the case of *Surek v Turkey*,³⁸ cited in court by counsel for the accused, the European Court for Human Rights (ECtHR) reviewed the Turkish prosecution of the

³⁸ *Sürek and Özdemir v Turkey*, Merits and Just Satisfaction, App No 23927/94, App No 24277/94, [1999] ECtHR 50, 7 BHRC 339, IHRL 3138 (ECtHR 1999), 8th July 1999, European Court for Human Rights. Grand Chamber.

owners of a newspaper that published declarations made by the Kurdish Workers Party (PKK), a designated terrorist organization in Turkey, about actions of the Turkish army. The ECtHR held that the prosecution violated the right of free expression under Article 10 of the ECHR, specifically finding that even in such a case there were “insufficient reasons for justifying interference” with this right. The alleged violation by the accused Cansu Pişkin would appear to be much less serious than that of the accused Kamil Surek. Of special relevance to Pişkin’s case, the ECtHR in Surek underlined the importance of upholding free expression to report on the actions of authorities because these “must be subject to close scrutiny...of public opinion.”³⁹

There is also the issue of how the statute, Article 6(1) of the Anti-Terror Law, was applied in the case of Cansu Pişkin. There are various translations of the relevant provision but it is clear that it focused on prohibiting the publication of the identity of officials who were assigned to the “fight” against terrorism, or who were “on anti-terrorist duties.” If this were limited to prohibiting the disclosure of identifying information of police officers engaged in undercover or confidential investigations of terrorist organizations, there could be justification for a restriction on free expression as permitted by Article 10(2) of the ECHR.

However, the prosecutor whose name Pişkin published was a judicial officer engaged in public prosecutions in open trials. His judicial role was emphasized by the fact that Turkish prosecutors sit at the same level in the courtroom as the judges, above defense counsel and other trial participants. This is consistent with the practice in several civil law countries in continental Europe and elsewhere and symbolizes the role of the civil law prosecutor as a magistrate who investigates both for and against guilt, in pursuit of the truth. He is not engaged in a fight against any group, but in the process of achieving justice. The question of his bias or lack of independence are the subject of necessary scrutiny by the public, which can only be accomplished if information like that in Cansu Pişkin’s publication is available to the public.

The issue of whether a public prosecutor is the kind of official covered by the statute was raised by defense counsel in the Pişkin trial but the judges found it sufficient that the prosecutor was performing his “duty in an investigation on charges of Terrorist Propaganda.” This suggests a view of public prosecutors as functionaries rather than as independent servants of justice.

This takes us to the conduct of the Pişkin trial itself. The text of her publication is presented and arguments are made, but aside from the finding that the prosecutor was an official performing a “duty” there is nothing showing how the judges were able to determine the guilt of the accused. This is particularly important on the question of the

³⁹ *Id.* at para 60.

mental element, the “specific intent” which the prosecutor in the Pişkin case acknowledges in the indictment required a showing that the publication was “done for the purpose of targeting.” Of course, judges cannot read the mind of an accused person and it may be possible to infer general criminal intent from the commission of an act. However, proof of specific intent requires more. The undersigned has had experience in prosecuting the specific intent crime of genocide including the inchoate crime of incitement to genocide. The burden can be met by presenting evidence of context, patterns of conduct, or prior writings or statements of the accused person.

In a case like Pişkin’s, one would expect evidence of context that would show there had been physical attacks on prosecutors or threats against them published in social media, or evidence about the related activity of the accused in supporting violent action for political change. As the defense argues in court, neither general intent or specific intent can be attributed to the accused. Indeed, in the record of the public trial there is no evidence presented to prove this essential mental element of the offense.

Finally, there is matter of the disposition of the case—the sentence pronounced by the judges. Pişkin is ordered to serve ten months in prison, but can avoid prison by submitting to five years of monitoring. Under the provisions of Article 231(11) of the Criminal Code, her acceptance of “deferment” of her prison sentence also costs her the right to appeal the guilty verdict.

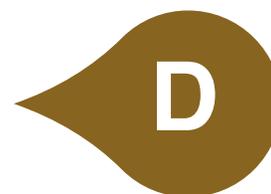
There is nothing inherently wrong in conditioning the suspension or deferral of a penal sentence on a defendant’s acceptance of terms of probation. However, this bargain can be seen as amounting to a restraint on the accused person’s right not only to challenge the legality of her own conviction but also to engage in future exercise of the right of free expression in a manner that is unfavorable to the authorities. As noted earlier, the OSCE Representative on Freedom and Media has found this kind of disposition “can serve as a tool to encourage self-censorship.”

CONCLUSION AND GRADE



While the trial of Cansu Pişkin was conducted in a manner that appeared to accord her certain of her rights as an accused person in a criminal trial, the prosecution of the case must be seen as a politically-motivated response to her publication, which called into question the independence of the prosecution of students who had peacefully protested the Turkish military incursion into Afrin, Syria. Additionally, the trial itself was defective in that an element of the charge—namely, the specific intent to target an individual to a terrorist threat—was not proved, and in having resulted in a disposition that further restricted her right to free expression. I would assign a grade of D based upon significant violations of the right of trial fairness, while not assigning a failing grade because the proceedings did not result in the imprisonment of the accused person.

GRADE:



ANNEXES



- A. Case Documents**
- B. Trial Monitor Notes**