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COMMUNICATION

In accordance with Rule 9.2. of the Rules of the Committee of Ministers regarding the supervision of the execution of judgments and of terms of friendly settlements

by ARTICLE 19 and the Turkey Strategic Litigation Project (TSLP)

Işıkırık v. TURKEY (41226/09)

The applicant in the lead case in this group, Mr Murat Işıkırık, was convicted of membership of an illegal organisation under Article 314 the Criminal Code, on the basis of Articles 220 (6) of the same Code for having peacefully participated in a funeral procession for members of the PKK (Kurdistan Workers' Party) on 29 July 2009. The European Court of Human Rights (Court, ECtHR) found that the application of Article 220 (6) was too broad, the sanction was disproportionate, there was no distinction under the law between a peaceful demonstrator and a member of an armed terrorist organisation and that Article 220 (6) was therefore not "foreseeable". The Court found that Article 220 (6) of the Criminal Code would inevitably have a particularly chilling effect on the exercise of the rights to freedom of expression and assembly.

This submission will therefore look at the legislative changes introduced by the Turkish authorities regarding Articles 220 (6) and 314 of the Criminal Code.¹ The submission will provide examples of cases demonstrating that the Turkish authorities' violations of the right to free expression using these articles have not only continued, but have in fact worsened since the ECtHR rulings in these cases and form part of a pattern of widespread human rights abuses. Finally the submission will address other claims made in the most recent action plans submitted by Turkey on this group, specifically regarding the Constitutional Court and the Judicial Reform Strategy.

ARTICLE 19

¹ This submission does not address provisions in the Prevention of Terrorism Act (Law No. 3713) but we stand ready to provide further comments on these provisions and their compliance with international law.

ARTICLE 19 is an international non-governmental organisation working around the world to protect and promote the rights to freedom of expression and freedom of information. We advocate for the development of progressive standards on freedom of expression and freedom of information at the international and regional level, and the implementation of such standards in domestic legal systems, including in Turkey. ARTICLE 19 frequently intervenes as a third party before the European Court of Human Rights including in relation to cases concerning Turkey. For instance, we have intervened in the Altan and Demirtaş cases. In those cases, we have outlined the implications of the now lifted State of Emergency in Turkey on the right to freedom of expression. At national level, we recently submitted expert opinions on cases against signatories of the Academic for Peace petition, among others. ARTICLE 19 has also monitored a number of trials of journalists and academics, including the Altans case, the Cumhuriyet case and the Zaman case.

The Turkey Human Rights Litigation Support Project

The Turkey Human Rights Litigation Support Project provides expertise and support to bring effective legal action to address the current human rights crisis in Turkey. Consisting of a group of leading academics, human rights lawyers and researchers, within Turkey and internationally, the project carries out a range of activities, including litigation, research, advocacy and capacity building in human rights. It provides legal assistance and guidance to domestic lawyers and other stake-holders in their litigation related activities in Turkey, working in close co-operation with lawyers, Bar Associations, national and international experts, and civil society actors to pursue strategic litigation. A recent report on the state of emergency in Turkey complements the advice and legal support provided in a number of cases before the domestic courts, including the Turkish Constitutional Court, the ECtHR and the UN bodies and procedures.

Key recommendations

We urge the Committee of Ministers to call on Turkey to take the following steps that are essential to the effective implementation of the judgments in the present group of cases:

Legislative measures -

- Repeal Article 220(6) and (7) of the Criminal Code in line with the Venice Commission's recommendations;
- Amend Article 314 of the Criminal Code to ensure stricter and clearer criteria for membership of a terrorist organisation and ensure strict application of the criteria within the courts.

Policy measures -

- Take concrete steps to restore the independence of the judiciary, including by reforming the method of appointment of the Council of Judges and Prosecutors.
- Ensure the implementation of Constitutional Court and ECtHR rulings, including by refraining from intemperate criticism of court decisions that undermine the rule of law.

Article 220 (6) & (7) and Article 314 of the Criminal Code

Paragraph 6 of Article 220 states that anyone who commits a crime “on behalf of an (illegal) organisation, even if they are not a member of that organisation, shall also be punished for being a member of the organisation.” Paragraph 7 of the same article provides that “any person who knowingly and willingly helps an organized criminal group without taking part within the hierarchical structure of the group” will also be punished as a member of that organisation.

The Court in the *Işıkırık v. Turkey* judgment found that these articles lacked foreseeability, in breach of the European Convention on Human Rights. In our view, the only effective way to comply with the Court’s judgment is for these provisions to be repealed in their entirety. This is consistent with the recommendations of the European Commission for Democracy Through Law (Venice Commission), who concluded that the section of Article 220 relating to sentencing individuals accused of aiding a terrorist organisation as if they are a member should be repealed in its entirety:²

“With respect to Article 314 (Membership to an armed organisation), the established criterion in the case law of the Court of Cassation that acts attributed to a defendant should show “in their continuity, diversity and intensity” his/her “organic relationship” to an armed organisation or whether his/her acts may be considered as committed knowingly and wilfully within the “hierarchical structure” of the organisation, should have a strict application. In paragraphs 6 and 7 of Article 220 (Establishing organisations for the purpose of committing crimes) (in conjunction with Article 314), the sentence “although he is not a member of that organisation, shall also be sentenced for the offence of being a member of that organisation.” should be repealed. In case this sentence in paragraph 6 and 7 is maintained, the application of Article 220 in conjunction with Article 314 should be

² Venice Commission, Opinion No. 831/2015 on Articles 216, 299, 301 and 314 of the Penal Code of Turkey, 15 March 2016, CDL-AD(2016)002, para 128, [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)002-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)002-e).

limited to cases which do not involve the exercise of the rights to freedom of expression and assembly.” (our emphasis)

Similarly, the Commissioner for Human Rights of the Council of Europe noted that “Considering the failure of past amendments of these provisions to prevent new human rights violations, the Commissioner considers that many of these provisions need to be simply abrogated.”³

In its action plan of 16 January 2020, the Turkish authorities claimed that legislative amendments had been made which were sufficient to prevent similar violations. The amendments were as follows:

- **Narrowing the scope of Article 220 (6):** Those charged with participating in an illegal assembly under section 28 (1) of the Marches and Demonstrations Act (Law no. 2911) would no longer be also charged with committing a crime on behalf of an illegal organisation and punished as a member of an illegal organisation;
- **Reduction of the punishment under Article 220 (6):** That those who commit a crime on behalf of an illegal organisation, would be punished for being a member, but the penalty could be reduced *by half*;
- **Reduction of the punishment under Article 220 (7):** That those who aid an illegal organisation, would be punished for being a member, but the penalty could be reduced *by two thirds*;
- **An additional safeguard mechanism:** The possibility of appealing convictions of less than 5 years at the Court of Cassation.

In its previous action plan of 30 November 2018, the Turkish authorities also stated:

- That this law would only apply to *armed* illegal organisations;
- That prosecutions for crimes committed through the expression of ideas and opinions, that require a judicial fine or imprisonment up to five years, were suspended.

We submit that these amendments have failed to resolve the problem referred to in the Court’s judgment in *Işıkırık v. Turkey*, namely the lack of foreseeability in the precise scope of the crimes and the fact that “Article 220 § 6 of the Criminal Code, as applied in the instant case, would inevitably have a particularly chilling effect on the exercise of the rights to freedom of expression and assembly”. While the amendments introduced allow for shorter sentences, this does not go to the heart of the violation found by the Court.

³ Memorandum of 15 February 2017 ((CommDH(2017)5)), para. 125.

Recent cases in the Turkish courts demonstrate that the Turkish authorities are still using these articles to prosecute individuals on the basis of their expression alone.

Even more worrying, the use of Articles 220 and 314 have become more arbitrary in the last few years since the prosecution of Işıkırık. In *Işıkırık*, the Court noted that when Article 314 (membership of an armed organisation) is applied alone, the Turkish courts had to have regard to the “continuity, diversity and intensity” of the acts to demonstrate membership. However, with Article 220 (aiding an armed organisation) there was no such requirement and yet individuals could be sentenced as if they were a member. In recent cases, the Turkish courts have not been applying those strict requirements to prove membership of an organisation under Article 314, where individuals have been found guilty of membership on extremely vague and circumstantial evidence. For those charged with ‘aiding an armed organisation’ the standard of evidence is poorer still, and frequently based entirely on the individual’s expression, including articles or columns they have written which do not incite violence or hatred, but merely express opinions critical of the government. As we explain in more detail below, in a number of cases, the domestic courts have convicted individuals of aiding an armed organisation or membership of an armed organisation merely for expressing opinions critical of the government, which had also been expressed by alleged members of the Gülen movement (which Turkey blames for the July 2016 failed coup) or the PKK (Kurdistan Workers’ Party).

Case law of the Turkish Judiciary

- *Ahmet Altan and Nazlı Ilıcak*: On 5 November 2019, at the end of their retrial, well known columnists and public figures Ahmet Altan and Nazlı Ilıcak, were sentenced by the Istanbul 26th Assize Court to 10 years six months and eight years nine months respectively under Articles 220 and 314 of the Criminal Code. Ilıcak and Altan had been initially detained in September 2016 and charged under Articles 309, 311 and 312 of the Criminal Code in relation to the coup attempt. They were found guilty in February 2017 and sentenced to life imprisonment. The Supreme Court of Appeals overturned the verdict in July 2019 and the retrial commenced in October 2019. ARTICLE 19 monitored the first trial and the retrial and found that no evidence of involvement in an internationally recognisable crime had been presented either in the indictment or at trial. The evidence presented related to their expression, or circumstantial evidence relating to who they had been in contact with, without recognising that editors or journalists must be in contact with a broad range of people in order to carry out their work⁴.

⁴ <https://www.article19.org/resources/turkey-altans-others-still-in-jail-as-retrial-commences-on-new-bogus-terrorism-charges/> <https://expressioninterrupted.com/ahmet-altan/>

- *Ahmet Şık and others in Cumhuriyet case:* On 21 November 2019, at their retrial, twelve individuals who previously worked for the newspaper Cumhuriyet were convicted of ‘aiding a terrorist organisation’ under Articles 220 and 314 of the Criminal Code by the Istanbul 27th Assize Court. The Supreme Court of Appeals had overturned their convictions for the same charges in September 2019 and recommended all be acquitted apart from Ahmet Şık, for whom charges of terrorist propaganda and denigrating the state were recommended. However, at the retrial the court ruled to uphold the initial convictions for everyone except Kadri Gürsel, who was acquitted. ARTICLE 19, along with other international observers, attended the trial and noted that the evidence presented in the indictment, during the trial and the retrial, consisted of a mix of newspaper articles and op-eds, social media posts, partial witness statements centred on opinion and speculation, and communications between journalists and their sources. The evidence as presented by the prosecution was wholly insufficient to prove beyond reasonable doubt the commission of any internationally recognisable crime.⁵
- *Atilla Taş, Murat Aksoy and others:* On 31 August 2016, singer and columnist Atilla Taş was detained on charges of ‘aiding an armed organisation’ under Articles 220 and 314 of the Criminal Code. He was held in pre-trial detention for 14 months. On 8 March 2018, he was sentenced to three years and one month in jail by the Istanbul 25th Assize Court for aiding an armed organisation. The conviction was upheld on 22 October 2018.⁶ Columnist Murat Aksoy was detained on 1 September 2016 and was held in pre-trial detention for 14 months. On 8 March 2018 he was sentenced to two years and one month in prison for aiding an armed organisation.
- *The Istanbul 10:* In the final prosecutor’s opinion presented on 27 November 2019, in the trial of human rights defenders the prosecutor requested prison terms for Günal Kurşun, İdil Eser, Özlem Dalkıran, Nejat Taştan and Veli Acı on the charge of “aiding a terrorist organization without being its member.” The prosecutor also asked for Amnesty International’s Turkey Office Director, Taner Kilic, to be convicted of membership of an armed organisation’ under Article 314 of the Criminal Code. The next hearing before the Istanbul 35th Assize Court is scheduled for 19 February 2020.⁷

<https://www.article19.org/resources/turkey-ahmet-altan-and-nazli-ilicak-released-but-judicial-harassment-continues/>

⁵ <https://expressioninterrupted.com/ahmet-sik/>

<https://www.article19.org/resources/turkey-judicial-harassment-of-ex-cumhuriyet-journalists-must-end/>

⁶ <https://expressioninterrupted.com/atilla-tas/>

⁷ <https://expressioninterrupted.com/prosecutor-seeks-jail-terms-for-6-rights-defenders-in-buyukada-trial/>

- *Sözcü*: On 27 December 2019, the Istanbul 37th Assize Court convicted seven journalists of *Sözcü* daily newspaper for supporting the failed coup in 2016. *Sözcü* is the largest opposition daily in circulation in Turkey and one of the last critical outlets still in print. The Court found *Sözcü* reporter Gökmen Ulu, columnists Emin Çölaşan and Necati Doğru, editor-in-chief Metin Yılmaz, news coordinator Yücel Arı, online editor-in-chief Mustafa Çetin and accounting officer Yonca Yüceli guilty of 'knowingly and willingly aiding a terrorist organisation while not participating in the hierarchical structure'. It handed down prison sentences ranging from two years and one month to three years, six months and 15 days.⁸
- *Former MP and journalist Eren Erdem*: On 1 March 2019, Erdem was sentenced to four years and two months in prison by Istanbul 23th Assize Court for 'aiding and abetting a terrorist organisation without being a member'.⁹
- *Seda Taşkın*: On 10 October 2018, Mezopotamya news agency reporter Taşkın was sentenced to three years and four months by Mus 2th Assize Court for "making propaganda for a [terrorist] organization" and four years and two months for "aiding and abetting a [terrorist] organization without being a member"¹⁰ in relation to her social media posts which were critical of the Turkish government's incursion into Syria as part of 'Operation Olive Branch'.
- *Pastor Andrew Brunson*: The American pastor Andrew Brunson was arrested in October 2016. The authorities accused him of having links with the PKK and the Gülen movement. He also faced up to 35 years in jail on charges of espionage. In October 2018, the Izmir 2nd Assize Court convicted him of terrorism charges and sentenced to three years and one and a half months under Article 314 of the Criminal code, on the basis of Article 220(7) of the same Code.¹¹

⁸ <https://www.penclub.fr/turkey-prison-terms-for-sozcu-journalists-condemned/>

⁹ <https://go.coe.int/6BI5T>

¹⁰ <https://go.coe.int/z2gld>

¹¹ <https://tr.euronews.com/2018/10/12/adim-adim-brunson-krizi-abd-turkiye-iliskilerinde-yaptirimlar-noktasina-nasil-gelindi->

In our view, these are far from being isolated examples. Instead, these cases form part of a pattern of violations which have increased in spread and intensity following the declaration of the state of emergency after the July 2016 coup attempt. In particular, use of these Articles of the Criminal Code against dissenting voices dramatically increased. The number of human rights defenders, journalists, politicians, academics, lawyers and others who are critical of the government's conduct and therefore charged with 'aiding' or being 'a member of' a terrorist organisation has reached an alarming level. In many cases, charges are based on opinions deemed to be even loosely aligned with a proscribed organisation's stance or to lend support to its cause.¹²

Although the state of emergency ended in July 2018, many exceptional measures prolonging detention and restricting freedom of movement and assembly have been enshrined in ordinary laws, normalising and perpetuating the effects of the state of emergency.¹³

Statistics confirm this trend. Between 2013 and 2018, a total of 334,678 charges were brought against people under Article 314 of the Criminal Code only. In 2017 alone, 183,121 people were indicted for crimes against the constitutional order, including terrorism related crimes, and thousands were detained on this basis.¹⁴ Statistics of the Ministry of Justice itself illustrate the sharp increase in the number of charges brought under Article 314 of the Criminal Code (which includes figures where Article 314 is applied in conjunction with Article 220(6) and (7)):¹⁵

- In 2013, 8,110 charges
- In 2014, 19,796 charges
- In 2015, 14,854 charges

¹² See Amnesty International, *Weathering the Storm, Defending Human Rights in Turkey's Climate of Fear*: <https://www.amnesty.org/download/Documents/EUR4482002018ENGLISH.PDF>, p.10.

¹³ Human Rights Watch, *Turkey: Normalizing the State of Emergency*, 20 July 2018, <https://www.hrw.org/news/2018/07/20/turkey-normalizing-state-emergency>; Reporters Without Borders, *Turkey: a permanent state of emergency by any name is no substitute for respecting human rights*, 20 August 2018, <https://rsf.org/en/news/turkey-permanent-state-emergency-any-name-no-substitute-respecting-human-rights>; NGOs joint recommendation, <https://euromedrights.org/wp-content/uploads/2018/09/NGOs-joint-recommendations-after-the-lifting-of-state-of-emergency-in-Turkey.pdf>; ICJ, *Justice Suspended: Access to Justice and the State of Emergency in Turkey*, p.10: <https://www.icj.org/wp-content/uploads/2018/12/Turkey-Access-to-justice-Publications-Reports-2018-ENG.pdf>; Law No. 7145 entered into force on 31 July 2018 restricting rights and effectively prolonging the state of emergency.

¹⁴ 154,000 people have been prosecuted and 50,000 detained on remand for pending proceedings for the first ten months of the State of Emergency: Bianet news, 'Number of People Detained Reached 50 Thousand under 15 Jul. 2016 Operations', 28 May 2017, <https://bianet.org/bianet/insan-haklari/186881-15-temmuz-sorusturmalarinda-tutuklu-sayisi-50-bin-136>.

¹⁵ See <https://arrestedlawyers.org/2019/09/23/abuse-of-the-anti-terrorism-laws-by-turkey-is-steadily-increasing/>

- In 2016, 29,434 charges
- In 2017, 146,731 charges
- In 2018, 115,753 charges

Introduction of an Effective Right of Individual Application before the Constitutional Court, the Judicial Reform Strategy and problems with implementation

Turkey's 2020 action plan also notes that individuals in Turkey have the right to apply to the Constitutional Court, which it states is an effective remedy for human rights violations. However, there are a number of factors limiting the effectiveness of the Constitutional Court, including slow and inconsistent decision-making and a lack of implementation of some of their decisions which is in part caused by the executive exerting excessive influence over the judiciary.

Slow and inconsistent decision-making

In the recent ruling of *Kavala v. Turkey*, the Court found that the Constitutional Court had not been sufficiently speedy in reviewing Kavala's application¹⁶. We are also concerned by inconsistent decisions at the Constitutional Court level. For example, while the Constitutional Court ruled that the rights of Mehmet Altan had been violated, it ruled that the rights of his brother, who was charged on very similar grounds, were not violated. In the Cumhuriyet case, the Constitutional Court ruled that the rights of Kadri Gursel had been violated, but did not recognise violations in the cases of the other applicants, despite similarities in the cases and evidence used against them¹⁷.

Public pressure on the courts

We are also concerned by public pressure placed on the Constitutional Court and its judges by the government, especially when considered in the context of the purging of over 4000 judges since the July 2016 coup attempt. For instance, in February 2016, after two ex-editors Can Dündar and Erdem Gül, were released from detention by a lower court following a ruling of the Constitutional Court, President Erdoğan commented on the ruling as follows: "I can't accept it. And I neither obey the decision, nor respect it."¹⁸

¹⁶ <http://hudoc.echr.coe.int/eng?i=001-199515>

¹⁷ For a detailed analysis of these judgments see.

Turkey Litigation Support, 'Commentary on the May 2019 judgments adopted by the Turkish Constitutional Court on the detention of journalists and a civil society leader', 2 August 2019, <https://www.turkeylitigationssupport.com/blog/2019/8/2/commentary-on-the-may-2019-judgments-adopted-by-the-turkish-constitutional-court-on-the-detention-of-journalists-and-a-civil-society-leader>

¹⁸ <https://www.independent.co.uk/news/world/europe/turkey-recep-tayyip-erdogan-rejects-court-ruling-to-free-journalists-can-dundar-and-erdem-gul-a6901726.html>

In January 2018, Prime Minister Binali Yıldırım alleged that the Constitutional Court's ruling in respect of the ongoing detention of Ahmet Altan and Şahin Alpay was "not the final decision" and suggested that the lower courts would "give the right decision" as they had "the full knowledge about the case". Following these comments the lower courts defied the Constitutional Court's ruling and refused to release them.

There has also been patchy implementation of ECtHR rulings. A December 2019 ruling on the case of Osman Kavala by the ECtHR has not yet been implemented and he remains in detention. After the ECtHR ruled in November 2018 that the rights of Selahattin Demirtaş were violated¹⁹, a new investigation was opened against him in order to prevent his release.

In its action plan of January 2020 the Turkish authorities claim that the Judicial Review Strategy will prevent further violations since it addresses concerns regarding rule of law and the independence of the judiciary. However, the text of the Judicial Review Strategy failed to introduce any concrete changes which would achieve this aim²⁰. The constitutional changes brought in through referendum in April 2017 modified the procedure of appointment of members to the Council of Judges and Prosecutors, which is the body responsible for the admission, appointment, transfer, promotion, disciplinary proceedings and supervision of judges, creating a dangerously imbalanced system which favours the executive. Indeed, before the changes were introduced, the Venice Commission noted that they were 'extremely problematic' and put the independence of the judiciary in 'serious jeopardy' since the President would have the power to appoint more than half the members of the body in charge of appointing and dismissing judges.²¹

Conclusions

ARTICLE 19 and TSLP believe that the Turkish government's Action plan of 2018 has plainly failed to take adequate general measures to implement the ECtHR judgments in the Işıkırık group cases. There are no significant legislative changes in the 2020 action plans, and the inadequacy of the steps that have been taken is borne out by evolving practice in Turkey. In turn the Judicial Review Strategy does not introduce any substantial

¹⁹ Selahattin Demirtaş v. Turkey (No. 2), (Application no. 14305/17), 20 November 2018, <http://hudoc.echr.coe.int/eng?i=001-187961>.

²⁰ For a detailed analysis of the Judicial Review Strategy see International Commission of Jurists, 'Turkey's Judicial Reform Strategy and Judicial Independence', November 2019, <https://www.icj.org/wp-content/uploads/2019/11/Turkey-Justice-Reform-Strat-Advocacy-Analysis-brief-2019-ENG.pdf>

²¹ Venice Commission, Opinion on the Amendments to the Constitution, 13 March 2017, CDL-AD(2017)005, para 119, [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=cdl-ad\(2017\)005-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=cdl-ad(2017)005-e).

reform and fails to address the core issues at stake regarding the independence of the judiciary. We therefore urge the Committee of Ministers not to close these cases due to the widespread rights violations taking place in Turkey, using the laws addressed in these cases, and which have dramatically increased in severity and spread since the rulings.

Recommendations

Legislative changes:

- Repeal Article 220(6) and (7) of the Criminal Code in line with the findings of the Venice Commission.
- Article 314 of the Criminal Code must be amended and the sentence required must be decreased. As identified by the Venice Commission, the law needs stricter and clearer criterion stipulated within its text.²² This includes, but is not limited to, requirement of acts attributed to a defendant to show “in their continuity, diversity and intensity” their “organic relationship” to a prescribed organisation, acts must be “committed knowingly and wilfully within the “hierarchical structure” of the organisation.” The government should ensure a strict application of the criteria.

Policy measures:

- The government must take all necessary measures to ensure the use of anti-terror legislation in full compliance with the protections provided under the Convention, particularly Articles 10 and 11.
- In light of the recommendations of the Venice Commission,²³ the government should commit to genuine judicial reform, taking concrete steps to restore the independence of the judiciary, including by reforming the method of appointment of the Committee of Judges and Prosecutors.
- In light of the recurring issue of failure to implement judgments of the ECtHR (e.g. in Osman Kavala and Selahattin Demirtas v. Turkey cases) which appears to be also resulted from the government’s approach to those cases, the government must take all necessary measures for the effective implementation of the ECtHR judgments.

²² Venice Commission, Opinion No. 831/2015 on Articles 216, 299, 301 and 314 of the Penal Code of Turkey, 15 March 2016, CDL-AD(2016)002,

[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)002-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)002-e).

²³ Venice Commission, Opinion on the Amendments to the Constitution, 13 March 2017, CDL-AD(2017)005, [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=cdl-ad\(2017\)005-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=cdl-ad(2017)005-e).