PEN NORWAY

Legal report on indictment:

Özgür Gündem Raid

PEN Norway Turkey Indictment Project

Hannah Beck & Clarissa Fondi
Published: 9 September 2021

PEN Norway Turkey Indictment Project

At PEN Norway, we are studying journalist and civil society-related cases from the last six years in Turkey by examining the foundation document of the case: the indictment.

Since January 2020, with an international team of judges, lawyers and scholars we have been examining indictments in prominent media and civil society cases, including Cumhuriyet, Büyükada and the Gezi Park trials.

Each report focuses on one indictment. A group of legal and human rights experts from six different countries will have assessed 22 indictments' compliance with local regulations and international standards by the end of 2021.

Our objective is to provide a tangible ground for discussions concerning the crisis of rule of law in Turkey and support dialogues that aim to improve the standards and put in place training in indictment-writing for Turkey's prosecutors and judges. You can find all published reports and articles (including our final report of 2020) on our website: norskpen.no.

Caroline Stockford, PEN Norway's Turkey Adviser, leads the project and lawyer Şerife Ceren Uysal is the Indictment Reports Supervisor.

The Turkey Indictment Project is funded by the Norwegian Ministry of Foreign Affairs and the Consulate General of Sweden in Istanbul.

1.) Introduction

The subject of this report is the indictment issued against 22 journalists and employees of Özgür Gündem, IMC TV, DIHA and others by the Istanbul Public Prosecutor on 27 September 2017 with investigation number 2016/101793 and indictment number 2017/19057. It comprises three pages, which are assessed in terms of Art 170 Turkish Criminal Procedure Code (TCPC) as well as Art 5, Art 6, and Art 10 European Convention on Human Rights (ECHR).

2.) Summary of Case Background Information

Özgür Gündem was a newspaper published between 1992 and 1994, which then started being published again in 2011. In its pages it criticised state policies and was known for publishing news about the Kurdish issue in Turkey.

On 16 August 2016, the 8th Istanbul Criminal Court of Peace ordered that Özgür Gündem newspaper should temporarily be closed for "spreading propaganda for a terrorist organisation". The same day, the announcement of closure was followed by a police raid of the newspaper's office in İstanbul's Beyoğlu district, during which 22 people allegedly insulted and threatened the police officers after the newspaper's editor-in-chief and the managing editor were arrested. Subsequently, 16 employees of Özgür Gündem alongside 6 journalists and cameramen from outside organisations IMC TV and DIHA, who were present at the scene to report on the raid, were detained as well.

After 48 hours of detention the 22 suspects were finally released. Some of them made complaints against the police officers in charge, accusing them of "insult" and "excessive use of force". The public prosecutor's office however, issued a decision of non-prosecution and announced this decision together with an indictment against all 22 journalists. Three police officers had filed counter-complaints, accusing the 22 journalists of "insult" and "prevention of public duty". Based on these allegations, the present indictment was issued on 27 September 2017, more than a year after the raid had been carried out.

The first hearing took place on 9 February 2018 with further hearings following on 29 June 2018, 20 January 2019, 19 June 2019, 05 November 2019, 25 February 2020, 02 June 2020, 22 October 2020, 16 February 2021, 22 April 2021 and 01 July 2021. The countless requests of the defence lawyers to close the case and return the confiscated phones and digital materials which were seized during the raid were rejected by the court. Due to the fact that 4 defendants did not appear for any of the hearings, the court issued arrest warrants to force their participation and postponed the trial numerous times in order to execute this decision. On 22 April 2021, the court ruled for the separation of the files of the 4 journalists in question and declared that all necessary evidence had been collected in the main case. Observing this brief hearing, PEN Norway reported that the file is now being submitted to the prosecutor for an opinion and that the next hearing is scheduled for 01 July 2021. On 01 July 01 2021, the court gave the defence lawyers time to submit their statements against the prosecutor's opinion and adjourned the hearing to 23 November 2021.

3.) Analysis of the Indictment

In this chapter we will assess whether the indictment meets legal requirements in terms of Turkish law as well as international standards. We will look at the structure and formalities, dissect the evidence, analyse the charges in terms of the connection between the crime and the act, and finally address some procedural concerns.

3.1 Structure and Formalities

The indictment consists of three pages. The first two pages provide general information about the indictment, the complainant, the plaintiffs, the suspects and their defence lawyer. Furthermore, a short overview about the offences in question, date and place of the crime, the applicable articles as well as collected evidence is given.

This general section is followed by one page of continuous text with the heading "The investigation report is examined" and concludes with the prosecutor's request to sentence the 22 suspects in accordance with stated articles. Furthermore, a note in regards to the decision of non-prosecution of the police officers, who were accused of "excessive use of force" is included at the very end of the indictment.

The structure of the main section is particularly striking, for it is formulated as a single sentence and is not formatted in a clear and comprehensible manner. Throughout the prosecutor's description of events and accusations, punctuation rules are ignored and paragraphs are only used twice in the conclusion section. Thus, the main section is hard to read and hinders a structured approach to a quick analysis of the whole document. Even though the indictment itself is rather short, it takes some effort to read and comprehend it after picking apart the various sections to grasp their meaning.

Assessment in terms of Turkish law

In accordance with Turkish law an indictment has to contain a wide range of elements. These elements are clearly listed in Art 170/3 TCPC and should be included in the document as exhaustively as possible.

In compliance with Turkish law the indictment mentions the identity of the 22 suspects as well as the name of their defence counsel, the complainant and the plaintiffs on page one and two.

Already on page two it is made clear what offences the journalists are accused of, namely "prevention of public duty" and "insult". In this respect, the prosecutor refers to Art 125/1, 125/3-a, 265/1, 265/3, 265/4 and 53/1 Turkish Penal Code (TPC). Furthermore, "16/08/2016 İstanbul's Beyoğlu" is mentioned as the date and place of the alleged crime. These circumstances are specified in the main section including the exact time the raid took place and the address of the newspaper's office.

As formally required, the indictment is addressed to the Criminal Court of First Instance in Istanbul and is signed by the Istanbul Public Prosecutor along with the date of issue: 27

September 2017. Because of its position at the end of the text body, this date is not immediately noticeable, even though it plays a crucial role in the timeline of the judicial proceedings and should therefore be clearly displayed.

As stated in Chapter 2, the date of the alleged crimes (16 August 2016) and the date of issue of the indictment (27 September 2017) lie more than a year apart. At first glance, the indictment does not seem overly complicated nor does it seem of extensive length. Therefore, the question arose why the investigation phase and drafting of the indictment extended over a period of more than 13 months.

According to Art 160 TCPC, public prosecutors should immediately start an investigation as soon as they are informed of circumstances that give sufficient reason to assume that a crime has been committed. The indictment's investigation number 2016/101793 suggests that the prosecutor started the proceedings already in 2016. Even though three police officers are indicated as plaintiffs, it is not mentioned when they brought forward their accusations nor are other details given on this issue.

Moreover, as soon as prosecutors are notified of a possible crime, it is their duty to "investigate the factual truth, in order to make a decision on whether to file public charges or not". They have to collect all necessary evidence in relation to the events and have to decide whether there is sufficient suspicion to indict. An extremely diligent method of conducting the investigation might explain the delay in issuing the indictment, but this should have subsequently led to an equally diligent drafting.
In the present case the list of evidence could, for example, comprise the statements of the plaintiffs and suspects as well as written police reports about the raid. However, as will be shown below, the prosecutor fell short of providing specifics in a lot of these instances especially in relation to the list of evidence itself and the attribution of its pieces to the actions of individual suspects. It seems like there was not a lot of time and effort put into the collection of evidence and the draft of a well-prepared document based on legal argumentation and reasoning.

In conclusion, we cannot know for sure why the prosecutor took so long to draft the indictment. Naturally, an excessive caseload or difficulties in regards to the production of evidence can always lead to a procedural hold-up. However, the structure and format of the indictment suggest that the document has rather carelessly been put together and most allegations are not presented with the necessary diligence.

Assessment in terms of International law

"An indictment plays a crucial role in the criminal process, in that it is from the moment of its service that the defendant is formally put on written notice of the factual and legal basis of the charges against him [or her]"[1]. The European Court of Human Rights has stressed in multiple decisions the importance of a well-drafted indictment in a criminal process, and has particularly pointed out the possible negative impacts of a defective indictment for a defendant's defence preparation and the further course of the proceedings.

[1] Kamasinski v. Austria, *European Court of Human Rights Application no. 9783/82* (19 December 1989) para. 79

Therefore, a clear format and structure is essential. Formulating the main part of an indictment without using punctuation and paragraphs is not in line with international standards and unnecessarily complicates the readability of an indictment. It severely affects the right to a fair trial and should be avoided.

Furthermore, according to Art 6/3-a ECHR, everyone has the minimum rights "to be informed promptly, in a language which he [or she] understands and in detail, of the nature and cause of the accusation against him [or her]". The underlying purpose of this article is to enable the defendants to prepare their defence accordingly and in good time before the first day of their trial.[2]

As long as the defendants have not received a formal notice, for example in the form of a written indictment, they do not know the exact crimes of which they are being accused. Therefore, it should be a number one priority for a prosecutor to conduct the investigation as fast as possible and conclude the findings in a reasonable and well-argued indictment. The longer the investigation period lasts, the harder it gets for the defendants to collect exonerating evidence to defend themselves against the allegations brought forward at a later time.

The chaotic structure of the indictment, the missing details and specifics as well as the slow progress of the proceedings are not in line with the international standards of a fair trial. The suspects have to put in extra effort to understand what they are accused of and start the trial already with a clear disadvantage.

3.2 Evidence

According to Art 170/3 TCPC, the prosecutor should add all evidence of the offence to the indictment. In the present case, a list of evidence is included in the general section on page two: "accusation, statements by the suspects, police reports and the whole investigation document".

Assessment in terms of Turkish law

The list of evidence, despite being more specific than other lists of evidence we have encountered in our previous reports, still does not fulfil the requirements of Turkish national law, which requires the evidence to be clearly stated. The prosecutor does not elaborate on the content of his abstract references neither in this part nor later in the document. Only in the conclusion section of the indictment does he once again mention that the alleged crimes are based on "the investigation document". Other than that, no further explanations are given as to which "police reports" he is referring to and what the "whole investigation document" is comprised of.

However, the most significant deficiency of the presented list lies within the missing explanation in regards to the "statements by the suspects". Only when searching for these ominous

[2] Guide on Article 6 of the European Convention on Human Rights*, Council of Europe* (last updated 31 December 2020) para. 395

statements in other parts of the indictment, it becomes apparent that the prosecutor is referring to two quotes, which contain what the journalists allegedly said during the raid. These citations carry the prosecutor's narrative on what crimes the suspects have committed and obviously are of utmost importance for his reasoning.

Therefore, the prosecutor should have mentioned meticulously where he derived this information from, for example from a specific police report or witness testimony. Instead, he fell short of explaining his abstract references in violation of Turkish law. The purpose of Art 170/3 TCPC is to guarantee that all necessary facts are included, in order for the suspects to be able to defend themselves. The list of evidence constitutes a major element of an indictment and should be handled with necessary care and diligence to ensure that it is in accordance with the domestic law.
Furthermore, Art 170/4 TCPC stipulates that all events that comprise the charged crime must be explained in the indictment in accordance to their relationship to the present evidence. These clarifications should constitute the main section of the document and should clearly display the prosecutor's thoughts and findings that lead to the issue of the indictment.

In Chapters 3.3 and 3.4, which are dedicated to the two offences in question, we will further analyse whether the prosecutor managed to precisely link the evidence to the charged crime. We will look at the pieces of evidence in detail and examine their position within the line of argumentation.

Assessment in terms of International law

Art 6/2 ECHR embodies the principle of the presumption of innocence as an important guarantee in the context of a criminal trial. All defendants must be presumed innocent until proven guilty. Furthermore, the principle determines that the burden of proof lies with the prosecutor and that any doubt should benefit the suspect. To meet this obligation, the prosecutor is required to adduce evidence sufficient to convict the defendants.[3]

Even though the prosecutor includes a list of evidence in the indictment, he does not specify in detail the particular documents and statements on which his account of facts and accusations are based. Instead, he presents his assumptions of the events without any further explanations and solely reproduces a seemingly subjective narrative which he justifies neither through precise evidence nor legal arguments. The suspects are therefore not provided with the necessary knowledge to prepare their defence accordingly and are stripped of a fair and transparent judicial process.

Furthermore, the prosecutor does not elaborate on the fact that the suspects denied the accusations. This rejection of allegations constitutes reason for doubt and should therefore be addressed in more detail. Instead, the prosecutor does not only fall short of presenting the reasoning of the suspects, but also does not include any facts in favour of the journalists as is required by domestic and international law.

In conclusion, the indictment's presentation of evidence severely compromises the fair trial

[3] Barberà, Messegué and Jabardo v. Spain, *European Court of Human Rights Application no. 10590/83* (6 December 1988) para. 77

principle, especially the right to presumption of innocence as guaranteed in Art 6 ECHR. The prosecutor failed to present the incriminating evidence in a clear manner and did not give any information on where his account of facts had been derived from.

3.3 Prevention of Public Duty

The first charge against the 22 suspects concerns the "prevention of public duty". The indictment accuses them of having offered resistance with the presumed aim of preventing officers of the İstanbul Police Headquarters from conducting the search on the premises of the Özgür Gündem newspaper and arresting editor-in-chief İnan Kızılkaya and managing editor Bilir Kaya.

Assessment in terms of Turkish law

"Prevention of public duty" under Turkish law is stipulated in Art 265 of the Turkish Penal Code (TPC). The specific charge in this case is focused on subparagraphs 1, 3 and 4 of Art 265.
The core of this charge lies in subparagraph 1, which defines the crime as "using force or threats against a public officer in order to prevent him from performing his duty".

Subparagraph 3 imposes increased penalty for committing the offence jointly with more than one person or by a person concealing their identity.

Subparagraph 4 addresses two further aggravating factors of committing the crime either with a weapon, or by taking advantage of the power to invoke fear derived from a criminal organisation.

The prosecutor explicitly includes subparagraphs 3 and 4 of Art 265 TPC, but throughout the indictment he neglects to specify the particular allegations derived from them, and fails to bring forward arguments to substantiate these charges. From the case's context, it can be speculated that the suspects are being accused of committing the offence jointly with more than one person and that the prosecutor insinuates a connection to an assumed terrorist organisation. It is unclear, whether he also accuses the suspects of concealing their identity or using weapons. In any case, mere speculation derived from a case's context, has no place in a fair trial and is inadmissible within any lawfully composed indictment. Art 170/4 TCPC stipulates that all events that comprise the charged crime must be explained in the indictment in accordance to their relationship to the present evidence. When it comes to these subparagraphs, the indictment does not meet the requirements of Art 170/4 TCPC.

Regarding subparagraph 1 of Art 265 TPC, one of two objective elements is required to fall within the scope of the offence - the use of either force or threats. Additionally, a subjective element needs to connect those actions with an intent to prevent a public officer from performing his or her duty.
While the indictment narrates the general occurrences during the raid, it fails to draw a precise connection between the alleged misconduct of the journalists and the particular legal elements required to be charged with Art 265 TPC and its subparagraphs.

The prosecutor sums up two statements the suspects are accused of having made. The first one allegedly occurred as a reaction to when the police officers attempted to arrest the newspaper's

editor-in-chief and managing editor:

“You can’t get anyone out of here, who are you, we don’t know you, you low-life losers”.

This statement is then classified by the prosecutor as “insulting and threatening” and in his opinion constitutes “verbal resistance” against the police officers.

While the use of the words "low-life losers" and its possible classification as an insult will be discussed in more detail below, we are unable to recognize the threatening nature of this statement.
Furthermore, saying that the police officers cannot get anyone out of there, asking who they are and stating that they don’t know them, certainly does not constitute a threat of any kind either. For reference, we looked up the legal definition of “threat” under Turkish law.

Art 106/1 TPC defines it as threatening “another individual by stating that he will attack the individual’s or his relative’s life or physical or sexual immunity” or threats related “to causing extensive loss of economic assets or other related harms”. It is evident that neither of the phrases lie anywhere within the scope of this legal definition. There was undeniably no announcement made by the defendants regarding any sort of attack on life, physical or sexual immunity, nor repercussions on economic assets to be feared whatsoever. None of the phrases can be interpreted as threatening in a legally relevant context. To claim the opposite defies any logic, as the prosecutor’s thought process lacks the necessary transparency to clarify how the wording could possibly be interpreted to constitute a crime under Art 265/1 TPC.

The second statement is quoted as follows:

“You scumbags, even the Gülenists were better than you, you are the policemen of AKP, we do not recognize the rulings of the court, we won’t let you search, we will rather die than surrender, you cannot get any of us out of here, everyone shall see your unlawfulness streamed on live stream”.

Dissecting this statement in terms of revealing possible threats is even more perplexing:
“Scumbag” is not a threatening word, its insulting qualities are not relevant for Art 265 TPC but will be analysed in the next chapter.

The phrasing that “even the Gülenists were better*, only insinuates that the suspects do not identify as Gülenists themselves. At this point we would like to once again point out, that according to Art 170/5 TCPC, an indictment is supposed to include not only the issues that are unfavourable to the suspects, but also issues in their favour. Had this indictment been crafted with more legal precision, this particular sentence would certainly have been used in favour of the suspects. To instead use it as grounds to imply a threatening nature to their statement, is deemed absurd.

The next sentence “you are the policemen of AKP” could only be interpreted as an insult, if being associated with AKP is seen in a negative light, otherwise it states a mere factual circumstance. Neither does “we do not recognize the rulings of the court” nor “we won’t let you search” constitute a threat, as it once again lacks any announcement of imminent attacks with consequences as defined in Art 106/1 TPC.

“We will rather die than surrender, you cannot get any of us out of here” only shows the suspects’ own fear to lose their lives through the İstanbul Police Headquarters, certainly not the other way around.

And finally, the phrase “everyone shall see your unlawfulness streamed on live stream" not only lacks any elements of threat in terms of Art 106/1 TPC, it is furthermore an entirely inconsequential announcement, if assumed, that the İstanbul Police Headquarters’ behaviour was lawful.

At this point we must come to the conclusion that the element of “threat” is not sufficiently given to constitute the crime of “prevention of public duty” according to Art 265/1 TPC.

The alternative requirement to be charged with Art 265/1 TPC is the element of “using force against a public officer in order to prevent him from performing his duty“. Examining the indictment to find sufficient argumentation for assuming that the suspects used “force”, did not take long, as the prosecutor mentions their physical actions only twice. First in the context of the police detaining the two editors, the other suspects “offered physical resistance”. And secondly, when the officers demanded the live broadcasting to be stopped, it was “met with physical attacks”. The prosecutor does not substantiate this accusation with a single example of what those physical actions looked like. He therefore fails to bring any evidence whatsoever to support this claim. Without precise reference, the incriminating factor of these physical actions cannot be determined and is therefore not sufficient to support a charge under 265/1 TPC.

When it comes to the subjective element stipulated within Art 265/1 TPC, the suspects’ actions need to be carried out with the intent to prevent a public officer from performing his or her duty. Since the prosecutor was not able to link the journalists’ actions during the raid to the requirements of the charged crime of Art 265/1 TPC, the subjective element is void. Nonetheless, the prosecutor’s final remarks need to be addressed, as they raise further concerns. At the end of the indictment, he writes that “it is understood that the suspects offered resistance with the aim of preventing the officers” from conducting the search in the premises and detaining the editor-in-chief and the managing editor. Even though the prosecutor failed to provide precise examples of evidence, he claims that “it is understood” they offered resistance.

Additionally, he does not only suggest the suspects’ possible subjective intentions, he factually claims their actions had the “aim of preventing public duties”, even though the objective actions were not classifiable as threatening nor forceful, as analysed in detail above. There are several decisions by the Turkish Supreme Court[4], in which the Supreme Court asks whether the actions underlying an accusation of violating Art 265 posed a realistic risk in terms of preventing officers from carrying out their public duty. Passive acts like talking, as long as there are no severe verbal threats being made, are not defined as criminal acts under Art 265 TPC, according to the Supreme Court. Since the prosecutor merely mentions that there were physical actions, but neglects to define any active acts, his claims in terms of Art 265 cannot be legally verified.

[4] See: Penal Departmant no: 18 of the Supreme Court, Merit No: 2015/37354, Decision No: 2017/9511, 25.09.2017, Penal Department no: 18 of the Supreme Court, Merit No: 2015/14091, Decision No: 2017/1028, 15.01.2015, Penal Department no: 5 of the Supreme Court, Merit No: 2013/3638, Decision No: 2014/7809, 08.09.2014 and many others

Assessment in terms of International law

In light of these shortcomings, we want to once again point out that charging the suspects with a crime, even though the evidence is not sufficient, severely violates the presumption of innocence within the right to a fair trial as protected under Art 6/2 ECHR. The purpose of the guarantee that anybody accused of a crime shall have the benefit of doubt, is the protection of defendants from unsubstantiated accusations. This fundamental right is ensured by imposing the burden of proof on the prosecution, making it an essential duty of any prosecutor to present an unambiguous and substantial causal relationship between evidence and crime. While analysing the charges in terms of Art 265 TCP, we found not only a clear failure to properly link evidence to accusations concerning the element of "threat", but even a sheer lack of argumentation regarding the element of "force", as there were not even enough relevant details given on the suspects' alleged physical actions to be used as evidence for the charged crime.

Additionally, we feel the need to reiterate the existence of the UN Guidelines on the Role of Prosecutors, which set out standards to ensure a fair, impartial and efficient prosecution of criminal offences. In this context we want to particularly point towards Principle 14, which determines that "prosecutors shall not initiate or continue prosecution, or shall make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded."

3.4 Insult against Public Officers

All 22 journalists are furthermore accused of "insulting public officers" during the search at the premises of Özgür Gündem newspaper. As has been stated above, the prosecutor lists two statements as evidence:

"You can't get anyone out of here, who are you, we don't know you, you low-life losers"

"You scumbags, even the Gülenists were better than you, you are the policemen of AKP, we do not recognize the rulings of the court, we won't let you search, we will rather die than surrender, you cannot get any of us out of here, and everyone shall see your unlawfulness on live stream"

No additional evidence or reasoning in relation to the allegation of "insult" is brought forward by the prosecutor in this indictment.

Before assessing the stated evidence in terms of domestic law as well as international law, one of the biggest flaws of this indictment has to be stressed. The prosecutor does not attribute the quotes to a specific person. All 22 journalists are accused of insulting the police officers, however, it is not clear who has made the remarks in question. For an objective reader it is truly unthinkable that all 22 journalists said the words as suggested in the indictment in unison. Scenarios in which only individuals spoke, seem more likely. Moreover, the situation at the time of the raid had surely been a stressful one for all parties involved and therefore the exact recollection of who said what might have been particularly difficult. Without presenting the necessary details to prove who spoke up, the prosecutor cannot use the quotes as sole argument against all 22 suspects. Consequently, he severely violated the principle of individual criminal responsibility as a fundamental concept of criminal law.

Assessment in terms of Turkish law

Leaving aside the problem of attribution, the above-mentioned statements should amount to a violation of Art 125 TPC, which stipulates the offence of "insult" as one of two possible scenarios. Either "a person attributes an act or fact to a person in a manner that may impugn that person's honour, dignity or prestige" or "a person attacks someone's honour, dignity or prestige by swearing". If the insult is committed "against a public officer due to the performance of his public duty" the possible penalty of imprisonment shall not be less than one year.

In terms of assessing the statements, the sections should be looked at individually again. For instance, following sentences can be excluded as evidence right away, as they do not constitute anything even remotely resembling an insult: *"who are you", "we don't know you", "you are the policemen of AKP" and "everyone shall see your unlawfulness on live stream"*. These quotes are mere statements without any form of value judgement, disregard or contempt towards the police officers. Therefore, they cannot serve as evidence for the offence of "insult".

Furthermore, the statements *"you can't get anyone out of here", "we do not recognize the rulings of the court", "we won't let you search" and "we will rather die than surrender"* could perhaps be examined under the aspects of Art 265 TPC "prevention of duty" and have already been analysed above, however they certainly entail no insulting components.

The fact that the prosecutor does not distinguish between evidence amounting to the one crime and evidence amounting to the other, but instead mixes it up without any explanation on the connection of evidence to specific events and alleged crimes, clearly violates Art 170/4 TCPC, which determines that "the events that comprise the charged crime should be explained in accordance to their relationship to the present evidence". The prosecutor does not make any effort to keep the two allegations apart and does not further elaborate on them individually. Therefore, it is left to the reader's own logical approach to analyse the statements and draw the correct conclusions as to which evidence is presented in regards to what offence. This of course constitutes a huge defect of the indictment and is not in accordance with Turkish law.

Consequently, only following statements remain to be assessed in terms of Art 125 TPC: *"you low-life losers", "you scumbags" and "even the Gülenists were better than you"*. Particularly the first two statements might fall within the scope of an "insult" and could be seen as incriminating evidence for attacking someone's honour by swearing. However, when evaluating the events, the overall stressful and chaotic atmosphere should be kept in mind and included into considerations. Prosecutors should at all times remain impartial in their investigation and evaluate the events fairly and well-balanced. They should present the evidence clearly. In the end, it will be up to the court to decide whether the offence of "insult" was committed.

In conclusion, the prosecutor did not act in conformity with Turkish law. He failed to attribute the various pieces of evidence to specific suspects and withheld legal arguments and interpretations all together. Every indictment should clearly list who is accused of what offence based on which evidence. The prosecutor did not only fail to give comprehensible clarification on which individual made above-mentioned statements but also deemed it unnecessary to explain where he found the evidence (namely the statements) he presented in the indictment. Furthermore, he did not explain the two offences of "insult" and "prevention of public duty" separate from each other in

accordance to their relationship to the evidence in violation of Art 170/4 TCPC.

Assessment in terms of International law

The missing diligence in terms of correct attribution of pieces of evidence to a specific person is alarming and severely compromises the lawfulness of the whole process. The right to a fair trial as set out in Art 6 ECHR is tremendously affected by the prosecutor's general approach to the present investigation, especially the seemingly careless way he attributed the statements to all 22 suspects. Without plausible explanation he accused all of them of the serious offence of "insult against public officers", thus opening up room for doubt in regards to his own impartiality and fairness.

According to Principle 13/b UN Guidelines on the Role of Prosecutors, a prosecutor "should protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim, and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect". Furthermore, the already mentioned Principle 14 stays relevant in this context as well.

The indictment lacks a fair and detailed evaluation of the different positions of the police officers on the one hand and the journalists on the other. The prosecutor did not elaborate on why the journalists denied the accusations and did not pay enough attention to the fact that an "insult" is not an offence that can be committed collectively. Each and every individual has to set a behaviour that amounts to the alleged crime. In the eyes of an objective reader, it seems obscure that all 22 suspects are accused of saying the exact same words. Even if some of the suspects did, it still lies within the prosecutor's responsibility to filter the information and only indict the individuals responsible. For all others, the proceedings should not have been continued, especially in case of doubt.

3.5 Procedural Concerns

Finally, we would like to address some severe procedural concerns that came up while we were analysing the indictment.

Our first concern is regarding the lack of information about the arrest of the editor-in-chief and the managing editor during the raid. In the beginning, the indictment gives broad background information about the investigation phase against the Özgür Gündem newspaper leading up to the raid. It goes into detail about accusations that the newspaper has allegedly been acting "like the media outlet of the terrorist organization", which lead to the decision to shut down the newspaper and to carry out a search on its premises to seize any materials and documents substantiating the pending allegations against them. Details are also given about how the riot police department entered the property, read aloud the order of the Istanbul 8th Magistrates Court in the presence of a lawyer of the Istanbul Bar Association and informed the Özgür Gündem employees and the other journalists who were present, about the search that would be carried out, explaining the procedures to editor-in-chief İnan Kızılkaya and managing editor Bilir Kaya.

This is where the detailed account of events stops, and the indictment's narration quickly jumps to when the police were attempting to detain both İnan Kızılkaya and Bilir Kaya, without giving

any context or previously mentioning any arrest warrants pending against them. Since the indictment refers to these arrests as the moment the 22 suspects started offering verbal and physical resistance, it seems fundamental to give some information as to why the two were being detained in the first place. Additionally, neither the editor-in-chief, nor the managing editor are listed as suspects in the present indictment.

Upon some background research, we are now assuming that arrest warrants against both individuals were in fact issued around the time the search warrant was issued. But reading the indictment without this background knowledge, it seems like the arrests were made without any arrest warrants and even before anything incriminating during the raid had happened, leaving the reader confused about the chronological order of arrest and crime and therefore questioning the legal reasoning and legitimacy of the arrests.

Assessment in terms of Turkish law

As a recurring topic in our report, our main procedural concern was that throughout the entire document, there are no separate claims made against the individual suspects. All charges and accusations are held against all 22 suspects. Due to the nature of the particular crimes, they are being charged with, generalised allegations can never constitute sufficient evidence against all individuals. Art 125 TPC for example, requires a person to attack someone through swearing. Regardless of whether the evidence constitutes an actual violation of Art 125 TPC, it cannot possibly be argued that every single person was shouting the exact sentences as quoted by the prosecutor as evidence at the exact same time. The same holds true for Art 265 TPC, as there are no specifics given about the journalists' alleged "use of force or threats" to link the crime, they are all being charged with, to individual actions.

Once again pointing towards Art 170/2 and 4 TCPC, all events that comprise the charged crime must be based on sufficient suspicion and must be linked to the presented evidence. Since the connection of the crime to the act in this indictment is particularly weak, we can't help but wonder whether the prosecutor's goal was to charge the suspects with any crime that seemed applicable, regardless of factual evidence.

Assessment in terms of International law

In this context, we would like to address a report from March 2016, submitted by the Human Rights Foundation of Turkey (HRFT) to the UN Committee against Torture as an alternative to the replies of the Government of Turkey to the list of issues prior to the submission of the fourth periodic report (LoIPR) from January 2014. In it, the HRFT voices concern about a significant increase in reported cases of torture and other forms of ill-treatment by police officers, occurring in police vehicles, confined areas, streets, homes, areas of demonstration or other unofficial places of detention in Turkey[5]. The HRFT then presents statistics and graphics[6] that reveal a connection between cases where victims reported their allegations against officers, and an observable increase in counter-charges against these victims. According to this report,

[5] Alternative Report to the United Nations Committee against Torture for its Consideration of the 4th Periodic Report of Turkey, *Human Rights Foundation of Turkey* (March 2016) para. 5

[6] Alternative Report to the United Nations Committee against Torture for its Consideration of the 4th Periodic Report of Turkey, *Human Rights Foundation of Turkey* (March 2016) para. 12

particularly Art 125 and 265 TPC are being used to file charges against people who reported police officers for use of excessive force. These two articles of the TPC are therefore said to be "commonly hanging over the population's head like the sword of Damocles"[7], which is why the HRFT calls this practice a "counter-charge phenomenon"[8] and sees in it a method of intimidation.

We cannot say for certain if these allegations can be connected to the present case. Nevertheless, the HRFT's findings had to be mentioned, as we cannot ignore their potential repercussions for our analysis and need to express our concern about these statistics. In light of this counter-charge phenomenon, the fact that all 22 suspects were arrested during the raid for allegedly violating Art 125 and Art 265 TPC, becomes additionally problematic in terms of Art 5 ECHR. This Article protects the right to liberty and security by stipulating that no one shall be deprived of their liberty unless in accordance with a procedure prescribed by law.

Since this case centres around a police raid on the premises of a newspaper critical of the government, the issued indictment additionally causes a particular uneasiness in regards to the Right to Freedom of Expression and Freedom of the Press, as protected under Art 10 ECHR. By now it is internationally known that there are multiple trials against many journalists connected to the Özgür Gündem newspaper.

4.) Conclusion

To conclude, we would like to summarise our main concerns and address what can be done to improve the quality of indictments like this in order to return to the core values of a fair trial and ensure commitment to the principles of the rule of law.

What is outlined in the indictment, is barely more than a narration of a rather chaotic raid. Given the characteristic concept of any raid though, chaos seems to be an inevitable element. It is therefore all the more crucial for a prosecutor to dissect the event into clearly structured sections in order to then connect each presumed illicit conduct to a particular charge. What we see instead in this indictment, is a general recount of events during the raid. It lacks a comprehensible and transparent line of argumentation to link each incident to the applicable articles and subparagraphs, which ultimately deprives the charges of their plausibility.

To improve the quality of this indictment and subsequently ensure a fair trial for all defendants in terms of Art 6 ECHR, it is crucial to follow a clearly structured format, using paragraphs and punctuation.

While it is certainly useful to give some background information to create context, there should also be a comprehensive list of evidence in more detail at the beginning of each section for every single offence.

[7] Alternative Report to the United Nations Committee against Torture for its Consideration of the 4th Periodic Report of Turkey, *Human Rights Foundation of Turkey* (March 2016) para. 12

[8] Alternative Report to the United Nations Committee against Torture for its Consideration of the 4th Periodic Report of Turkey, *Human Rights Foundation of Turkey* (March 2016) para. 11

Most importantly, every evidence in the indictment needs to be clearly linked to the charged crime. It does not suffice to assign general evidence to a charge. The reasoning needs to be precise and each argument needs to refer to the specific subparagraphs. If a piece of evidence cannot be properly linked to a particular crime, it cannot be included in an indictment, as prosecution on grounds of speculations must not be continued.

About the authors

Mag.a iur. Hannah Beck is a young human rights lawyer from Vienna, Austria. She studied law with specialisation in human rights law and law of international relations at University of Vienna, Austria, and University of Pretoria, South Africa; and is representing the Vienna-based Ludwig Boltzmann Institute of Human Rights as one of two Austrian legal experts in PEN Norway's Turkey Indictment Project.

"Mag.a iur. Clarissa Fondi is a Sociocultural Anthropologist and dedicated Human Rights Lawyer from Vienna, Austria living in Dublin, Ireland. She is one of the two Legal Experts representing the Austrian Ludwig Boltzmann Institute of Human Rights in PEN Norway's Turkey Indictment Project."