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Legal report on indictment:

Adana Bar Association

PEN Norway Turkey Indictment Project

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Published: 28 October 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.

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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

This evaluation report is part of the Turkey Indictment Project established by PEN Norway. The scope of this legal report is to examine the indictment issued against seven lawyers of the Adana Bar Association (Adana BA) by the Adana Chief Public Prosecutor's Office on 5 April 2018 with investigation no. 2017/40802 and indictment no. 2018/5925 in light of domestic laws and international human rights laws in order to ascertain whether the indictment complies with these standards. Section 2 of the report includes a brief summary of the case. Section 3 presents the legal analysis of the indictment. Section 3.1 introduces the relevant provisions, being the first sentence of Article 25/b.1 of the State of Emergency Law (SoE or Law No. 2935) and Article 53 of the Turkish Penal Code (TPC). Section 3.2 evaluates the indictment against domestic law focusing on Article 170 of the Turkish Criminal Procedure Code (TCPC). Section 3.3 assesses the indictment in light of international standards, specifically Articles 6, 7, 10 and 11 of the European Convention on Human Rights (ECHR), the United Nations (UN) Guidelines on the Role of the Prosecutors and the UN Basic Principles on the Role of Lawyers. The report concludes, in section 4, with recommendations.

2.) Summary of Case Background Information

The indictment targets seven suspects. The suspects are lawyers and are all registered with the Adana BA. Most of these lawyers are well-known as a result of their prominent human rights work and are members of the Progressive Lawyers Association (ÇHD). The suspects are: Ali Akıncı, Sebahattin Demir, Sevil Aracı Bek, Şiar Rişvanoğlu, Tugay Bek, Ümit Büyükdağ and Veli Küçük (the former president of the Adana BA). The lawyers were indicted for "acting in a contrary way to the Governorship's measures".[i] The background of the case is as follows.

In November 2016, three lawyers[ii] that represent the Cumhuriyet Newspaper were arrested together with the journalists from the Cumhuriyet newspaper.[iii] In April 2017, several lawyers launched an action against the unlawful arrest of their colleagues. This initiative is called "Justice Watch". Between April 2017 and December 2018, Justice Watch was held weekly without any interruptions. Justice Watch ended in its 85th week with the slogan "Justice Watch is coming to an end, the struggle for justice will continue". Every week, a local BA became the

host of the Justice Watch. In May 2019, Justice Watch was re-launched, because the lawyers and the journalists were rearrested after they had been released.

On 18 May 2017, the seventh Justice Watch was organised all over Turkey to support the imprisoned lawyers that were defending the journalists from the Cumhuriyet newspaper. In Adana, the Justice Watch was organised by the Adana BA, the Progressive Lawyers Association and other legal groups. The action included a sit-in and a press release that was read out loud, to support and ask for the release of the imprisoned lawyers.

The Governor of Adana issued an order and announced that any kind of assembly including press releases in front of the Courthouse or close to the building was forbidden. The order included specific locations such as the courthouse and the İnönü Park. At the same time, the order of the governor was saying "etc" after defining specific activities. The activities listed as forbidden were also expended by "etc." including press releases, camping, demonstrations and "all the other activities". This order had been issued many times during the state of emergency. The order affected not only the Justice Watch, but also student protests, peace actions and any kind of movement in Adana no matter what the content was.

The Adana police officers told the participants of the Justice Watch that they were committing a crime, as organising and reading a press release out loud was prohibited. The police informed the lawyers that they would initiate a criminal investigation against every individual who joined the Justice Watch. The lawyers that organised and joined the Justice Watch underlined that fundamental rights should not be interfered with by arbitrary practices and that the public needs to be informed. The lawyers read the press release publicly and sat in front of the courthouse to protest against the attacks on lawyers by the administrative powers. The police officers recorded the demonstration. On 13 June 2017, the police provided an investigative report with respect to every lawyer that had joined the Justice Watch. The report concluded that the lawyers acted against the order of the Governor. Following this report, the prosecution office initiated a criminal investigation against twelve lawyers.

According to Article 32 of the Law of Misdemeanour, violation of an order given by the competent authorities due to judicial proceedings or for the purpose of protecting public security, public order or general health, is treated as a misdemeanour. According to this regulation, the suspect is offered to make a prepayment and if the suspect accepted to pay, the prosecutor makes a non-prosecution decision. If the suspect accepts to pay the required

amount of money within a set time period, the prosecution office has to close the investigation and must issue a decision of non-prosecution. If the suspect declines to fulfil the payment, an indictment will be issued.

Of the twelve suspects, six of them paid the penalty (of less than 1000-Turkish Lira), including the former president of the Adana BA (Veli Küçük). However, the prosecutor made a mistake and issued an indictment against the president of the Bar nevertheless. The other six lawyers decided not to pay the prepayment amount and claimed that the prepayment decision was unlawful. An indictment was issued against them as well.

On 5 April 2018, the indictment against the seven lawyers was submitted to the court. The indictment was accepted by the Adana Second Criminal Court of First Instance. The accusation in the indictment was "acting in a contrary way to the Governorship's measures" (the first sentence of the Article 25/b.1 SoE) and included the possibility to impose heavier sanctions for committing the crime deliberately (Article 53 TPC).[iv]

On 15 January 2019, a hearing on the merits of the case was held. In their defence, the lawyers admitted that they had participated in the demonstration, but underlined that their actions did not qualify as a crime referring to their right to demonstrate. In their view, their actions were fully legal. Later on, in the third hearing, the Court of First Instance ruled that the demonstration fell under the protection of the right to free speech and that the defendants did not have any intent to commit a crime. The Court of First Instance issued the acquittal of six lawyers and dismissed the case against the president of the Adana BA, who had already paid the penalty.

The lawyers appealed the decision because they wanted to challenge its justification. Even though the Court of First Instance had acquitted them, in the justification for its decision, the Court only focused on the lack of intent as a reason for the acquittal. The decision could be interpreted as if a crime was committed without intent, though the lawyers were of the opinion that no crime was committed at all. In the appeal, the lawyers underlined that the justification of the acquittal should reflect this point. The Adana Regional Court of Appeal examined the casefile and accepted the lawyers' application. The Court of Appeal stated that the part of the verdict justifying the acquittal by the lack of intent should be removed and that the following sentence should be included instead: "[s]ince the legal elements of the crime charged against the accused are not formed". The acquittal of the lawyers was therefore final (after the judgment of the Regional Court of Appeal) on 7 December 2020.

3.) Analysis of the Indictment

3.1 Introductory Remarks and Formalities

The indictment accuses seven lawyers all registered with the Adana BA. The first sentence of Article 25/b.1 SoE and Article 53 TPC are referred to as the relevant penal provisions. The indictment takes up a little over one page. The indictment starts with formalities, such as the description of the crime, the place and the date of the alleged crime, the applicable laws and the evidence. It makes sense to commence with these formalities, as this is an effective way to clarify the most essential elements of the accusations against the defendant.

The indictment is rather short. Nevertheless, it is difficult to comprehend. The indictment is poorly written and does not entirely fulfil the basic purpose of an indictment. Namely, to give the suspects an understanding of the accusation, the legal basis and the relevant evidence that supports it.[v] The issue date of the indictment (05 April 2018) is marked at the end but it is not clear what this date refers to. It would be preferable to mention the issue date at the beginning together with the formalities.

3.2 Evaluation of the Indictment under Domestic Law

3.2.1 The Requirements of Article 170 TCPC

Article 170/3 TCPC prescribes the elements that an indictment should include.[vi] The indictment conforms with most of the formal requirements in Article 170/3 TCPC. It clearly sets out the identity of the suspects, the date and the place of the crime.

There is no mention in the indictment of the defence counsel (170/3/b TCPC). Neither is mentioned whether any of the suspects have been in detention or not. As none of the suspects were, the lack of information on this matter is not important to the overall evaluation of the indictment. The crime charged, described as "acting in a contrary way to the Governorship's measures", and the related articles applicable (Article 25/b.1 SoE and 53 TPC) are set out in the introductory section. The elements of the crime, laid down in the first sentence of Article 25/b.1 SoE, seem to be the following:

“anyone whose actions constitute a breach of the measures taken by a regional governor or the governor of a province in accordance with the authority provided in this Law or in other laws, or who disobeys orders or does not carry out the requirements of such orders”.[vii]

The elements of the crime seem to be “actions”, “breach of the measures taken (…)” and “disobeys orders (…)”. From the wording of the indictment, it is unclear whether the allegation concerns a breach of a measure or a disobedience of an order. It does reflect that the suspects organised a sit-in action and a press release on a banned location, and that the suspects continued joining the action after they were notified of the unlawful characteristics thereof. However, it does not mention that the suspects were given an explicit order to leave the premises or discontinue their actions, which they would have then disobeyed.

Additionally, given the elements in the penal provision, it is important that the indictment includes the respective measure or order that the actions were allegedly contrary to. The indictment only refers to an “APPROVED” circular issued by the Governorship of Adana banning locations for meetings, demonstrations, marches and press conferences. It does not mention the number of the order or the date in which the circular was issued.

Therefore, there is no clear link between the elements of the offence and the wording in the indictment, which could be seen as a violation of Article 170/3/h TCPC. The prosecutor has drafted the indictment as a story and not in accordance with the legal rules of procedure that should have been followed. As a result, the indictment does not inform the suspect which measure is breached or which order is disobeyed.

An important requirement of Article 170 TCPC is the “evidence of the offence”.[viii] The list of evidence in the indictment is presented as follows: “Allegations, defence, reports issued on the day of the incident, criminal records, registers of persons, the scope of the whole investigation document”.[ix]

It is the duty of the prosecutor to connect the evidence to the alleged crime, as mentioned in Article 170/4 TCPC, which prescribes that “the events that comprise the charged crime shall be explained in the indictment in accordance to their relationship to the present evidence”.[x] The list of evidence does not fulfill its purpose entirely. Firstly, in respect of the “reports issued on the day of the incident”, the type of reports and the entity that issued them is left unspecified. If the reports mentioned here are the reports issued by the Adana Provincial

Security Directorate, it is unclear why only the report issued on the day of the incident is mentioned, and not the report issued on 9 June 2017, that is mentioned in the indictment itself. Secondly, the evidence refers to generic "registers of persons", which does not link the individual suspects to the crime.

Furthermore, the conclusion of the indictment does not include the issues that are both favourable and unfavourable to the suspect, as prescribed under Article 170/5 TCPC. In this respect, mention should have been made to the right of freedom of speech and assembly, and the reasons why these rights would or would not be applicable to this case.

Additionally, the indictment does not include any reference to intent. It does refer to Article 53 TPC, which prescribes heavier sanctions for committing the crime deliberately. The indictment also concludes that the suspects should be deprived of certain rights for committing the crime deliberately with reference to this article. For this reason alone, the indictment should have included the basis for the intent or the lack thereof. Secondly, a lack of intent would mean that the crime is qualified as a misdemeanor, for which a prepayment should have been offered under the condition of non-prosecution. The mere fact that an indictment is issued for the alleged crime either implies that the prosecution means that the crime was committed intentionally, or that the suspects denied the offer of the prepayment. This should also be included in the indictment, albeit in a separate paragraph. Moreover, it can be argued that a reference to intent should have also been included due to the wording of the first sentence of Article 25/b.1, as "disobeying orders" or "not carrying out the requirements of such orders" rarely happens unintentionally. Lastly, the concluding section of the indictment does not refer to a punishment or measure that is foreseen. This violated Article 170/6 TCPC.[xi]

3.3 Evaluation of the Indictment under International Standards

International law has precedence over national law, according to Article 90 of the Republic of Turkey's Constitution.[xii] Turkey has ratified the European Convention of Human Rights (ECHR) in 1954. Citizens of Turkey are therefore directly protected, via the Constitution, by the fair trial standards established in Article 6 ECHR, the freedom of expression embodied in Article 10 ECHR, and the right to freedom of assembly and association enshrined in Article 11 ECHR.

Other relevant international standards can be found in the United Nations (UN) "Guidelines on the Role of Prosecutors",[xiii] and the standards set out by the International Association of

Prosecutors on the principle of fair trial regulated under the ECHR.[xiv] Furthermore, and especially relevant to this case, the UN Basic Principles on the Role of Lawyers.[xv]

3.3.1 Article 6 ECHR

The ECtHR guide on Article 6 ECHR includes several relevant starting points to assess whether the indictment is in accordance with the right to fair trial.[xvi] First of all, Article 6/3-a prescribes that everyone charged with a criminal offence has the right to be informed promptly, in a language which he/she understands and in detail, of the nature and cause of the accusation against him/her.[xvii]

The Guide on Article 6 ECHR includes the following information:

"Article 6/3-a points to the need for special attention to be paid to the notification of the "accusation" to the defendant. Particulars of the offence play a crucial role in the criminal process, in that it is from the moment of their service that the suspect is formally put on written notice of the factual and legal basis of the charges against him (*Pélissier and Sassi v. France* [GC], § 51; *Kamasinski v. Austria,* § 79). Article 6 § 3 (a) affords the defendant the right to be informed not only of the "cause" of the accusation, that is to say, the acts he is alleged to have committed and on which the accusation is based, but also of the "nature" of the accusation, that is, the legal characterisation given to those acts (*Mattoccia v. Italy*, § 59; *Penev v. Bulgaria*, § § 33 and 42). [...]

Article 6/3-a does not impose any special formal requirement as to the manner in which the accused is to be informed of the nature and cause of the accusation against him/her (*Pélissier and Sassi v. France*[GC],§53; *Drassich v. Italy*,§34; *Giosakis v. Greece* (no.3),§29). In this connection, 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 (*Kamasinski v. Austria*,§79).The duty to inform the accused rests entirely on the prosecution and cannot be complied with passively by making information available without bringing it to the attention of the defence (*Mattoccia v. Italy*,§65; *Chichlian and Ekindjian v. France*, Commission report,§71)."[xviii]

Although the indictment is written in Turkish, which is a language that the suspects understand, the indictment is difficult to comprehend. This is due to the long and complicated sentences which are separated by a semicolon. The format makes it hard to unravel the actual

content. The failure to connect the alleged crime to the evidence leave the suspects in ignorance about the crime they are accused of. It is not clear which specific measure or order was breached or disobeyed. This makes the preparation for the defence difficult.

3.3.2 Article 7 ECHR

From Article 7 ECHR it can be inferred that offences and penalties must be accessible and foreseeable. This principle of legality requires offences and corresponding penalties to be clearly defined by law. As the order or a reference thereto is not included in the indictment, it is difficult to examine whether the legal basis for the criminal investigation is in line with the criteria of Article 7 ECHR. It has been understood that the order included specific locations, but that the governor also referred to "all the other activities" that are forbidden. If the scope of the governor's order was that broad, it is not foreseeable which specific acts are criminalized. In this respect, it should be noted that criminal investigations in relation to the Justice Watch only took place in Adana, and not in the other cities in which the Justice Watch was organized.

3.3.3 Article 10 ECHR

3.3.3.1 Press Freedom and Attorney's Freedom of Expression

The right to freedom of expression is enshrined in Article 10 ECHR.[xix] The group of seven lawyers from the Adana BA was indicted for acting contrary to the Governorship's measures. It can be inferred from the indictment that the alleged behaviour includes the organization of a sit-in action and the reading out loud of a press release. This was done at the initiative of the Justice Watch, by which the lawyers wanted to take action and raise awareness for the unlawful detention of their colleagues. The governor's measure that allegedly prohibits this behaviour therefore interferes with the right to freedom of expression and press.

The press is seen as a critical watchdog in a democratic society, which the ECtHR cherishes and defends under the right to freedom of expression.[xx]

"[…] the impugned interference must also be seen in the context of the essential role of the press in ensuring the proper functioning of a political democracy (see among many other authorities, the *Lingens v. Austria* judgment of 8 July 1986, Series A, no. 103, p. 26, § 41, and the abovementioned *Sürek (No. 1)* judgment, § 59). While the press must not overstep the

bounds set, inter alia, for the protection of vital State interests, such as national security or territorial integrity, against the threat of violence or the prevention of disorder or crime, it is nevertheless incumbent on the press to impart information and ideas on political issues, including divisive ones. Not only has the press the task of imparting such information and ideas, the public has a right to receive them. Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders (see the abovementioned *Lingens* judgment, p. 26 §§, 41-42)".[xxi]

The Adana Police Headquarters told the participants of the (Adana) Justice Watch that organizing a press release was forbidden, that the lawyers were committing a crime and that a criminal investigation would be initiated against every individual who joined the Watch. From the indictment, it is not clear what the press release entailed and what the lawyers said. Considering the broader context of the Justice Watch, the group of lawyers must have expressed their dissenting opinions regarding the arrest of their colleagues. The right to freedom of expression which encompasses press freedom was infringed for no apparent reason or at least not for the lawful restrictions laid down under paragraph 2 of Article 10 ECHR.

Furthermore, the position of participants in the justice system and their freedom of expression in the context of judicial proceedings is specifically mentioned in the ECtHR Guide on Article 10 ECHR.[xxii] The lawyers from the Adana BA play a fundamental role in the justice system in their positions as lawyers (*Morice v. France*[GC],§170).[xxiii] Hence, their views regarding the unlawful detention of other lawyers merits even more protection.

"The specific status of lawyers gives them a central position in the administration of justice as intermediaries between the public and the courts. They therefore play a key role in ensuring that the courts, whose mission is fundamental in a State based on the rule of law, enjoy public confidence (*Morice v. France*[GC], §§ 132-139; *Schöpfer v. Switzerland*, §§29-30; *Nikula v. Finland*,§45; *Amihalachioaie v. Moldova*,§27; *Kyprianou v. Cyprus*[GC], §173; *André and Another v. France*,§42; *Mor v. France*,§42; and *Bagirov v. Azerbaijan*, §§ 78 and 99)."[xxiv]

Moreover, the contribution of the lawyers from the Adana BA to the Justice Watch clearly concerns a matter of public interest. In the *Mustafa Erdoğan and others v. Turkey* case the

ECtHR noted that "issues concerning the functioning of the justice system constitute questions of public interest, the debate on which enjoys the protection of Article 10" and "[t]he press is one of the means by which politicians and public opinion can verify that judges are discharging their heavy responsibilities in a manner that is in conformity with the aim which is the basis of the task entrusted to them".[xxv] Additionally "the Court reaffirms that the courts, as with all other public institutions, are not immune from criticism and scrutiny. *In particular, a clear distinction must be made between criticism and insult.* If the sole intent of any form of expression is to insult a court, or members of that court, an appropriate sanction would not, in principle, constitute a violation of Article 10 of the Convention (see *Skałka v. Poland*, no. 43425/98, § 34, 27 May 2003)".[xxvi]

Furthermore, the case of *Morice v. France* is a significant precedent. This case demonstrates the importance of preserving the attorneys' freedom of expression. Permitting attorneys to engage in a constructive dialogue with judges and about the justice system in general, is preserving the rule of law.[xxvii] However, it is also true that "[t]he freedom of expression of lawyers also has its limits, in order to maintain, as is provided for in Article 10, paragraph 2 of the Convention, the authority and impartiality of the judiciary".[xxviii] In this case there is no evidence that the lawyers engaged in abusive criticism or insult of the justice system.

Furthermore, concerning the amount of protection afforded to authorities when the subject at hand is of public interest, the Court clarified the following:

"Moreover, as regards the level of protection, there is little scope under Article 10/2 of the Convention for restrictions on political speech or on debate on matters of public interest (see *Sürek v. Turkey* (no. 1) [GC], no. 26682/95, § 61, ECHR 1999-IV; *Lindon, Otchakovsky-Laurens and July v. France* [GC], nos. 21279/02 and 36448/02, § 46, ECHR 2007-IV; and *Axel Springer AG v. Germany* [GC], no. 39954/08, § 90, 7 February 2012). Accordingly, a high level of protection of freedom of expression, with the authorities thus having a particularly narrow margin of appreciation, will normally be accorded where the remarks concern a matter of public interest, as is the case, in particular, for remarks on the functioning of the judiciary, even in the context of proceedings that are still pending in respect of the other defendants (see *Roland Dumas v. France*, no. 34875/07, § 43, 15 July 2010, and *Gouveia Gomes Fernandes and Freitas e Costa v. Portugal*, no. 1529/08, § 47, 29 March 2011). A degree of hostility (see *E.K. v. Turkey*, no. 28496/95, §§ 79-80, 7 February 2002) and the potential seriousness of certain

remarks (see *Thoma v. Luxembourg*, no. 38432/97, § 57, ECHR 2001-III) do not obviate the right to a high level of protection, given the existence of a matter of public interest (see *Paturel v. France*, no. 54968/00, § 42, 22 December 2005)".[xxix]

The Human Rights Committee found a breach of Article 19 of the International Covenant on Civil and Political Rights (ICCPR) in *Sviridov v. Kazakhstan.* The defendant, a human rights activist, was fined for displaying a placard that stated: "[i] demand a fair trial for Mr. Zhovtis!"[xxx] After witnessing Mr. Zhovtis' trial, the defendant recorded many violations of the right to a fair trial and posted them on his organization's website. According to the Human Rights Committee, Article 19 ICCPR protects an individual's right to share "opinions on matters of human rights such as the right to a fair trial";[xxxi] and that the State had therefore "interfered with the author's right to freedom of expression and to impart information and ideas of all kinds".[xxxii] Thus, Article 19 ICCPR protects opinions that relate to the right to fair trial. The present indictment indirectly presents the concerns of the group of lawyers from the Adana BA about their colleagues who have been unlawfully arrested. An unlawful arrest directly touches upon the fundamental requirements of the right to fair trial. Therefore, the opinions of the lawyers should be protected both under Article 10 ECHR and under 19 ICCPR.

All lawyers should be afforded a high level of security whether expressing themselves in court or in the context related to their work as lawyers. Even if the press release and the sit-in can be considered outside of this context, the group of lawyers from the Adana Bar acted from a central position in the administration of justice. According to the case law of the ECtHR, lawyers' activities are critical for the public in order to have faith in the legal profession's capacity to offer effective representation. By expressing their dissent regarding the unlawful arrest of their colleagues through a sit-in and a press release, the lawyers were critical of the system. The present indictment therefore violates the freedom of expression as laid down in Article 10 ECHR.

3.3.3.2 Freedom of Expression and State of Emergency (SoE)

The right to freedom of expression has been severely curtailed by SoE decrees in Turkey.[xxxiii] In this case, the Governor of Adana issued the order reflected in the indictment many times during the SoE. In 2017, the report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression on his mission to Turkey concluded that

“the situation of the right to freedom of expression in Turkey is in grave crisis and requires immediate steps for Turkey to be compliant with its obligations under international human rights law. In particular, focus is paid to the state of emergency decrees and their effect on the 23 arrest, detention and harassment of journalists, media closures, Internet restrictions, academic freedom, the dismissal of public officials and the suppression of civil society”.[xxxiv]

In 2018, the Commission of the European Union found in the “Turkey 2018 Report Communication on EU Enlargement Policy” that “these emergency decrees have notably curtailed certain civil and political rights, including freedom of expression, freedom of assembly and procedural rights. They have also amended key pieces of legislation which will continue to have an effect when the state of emergency is lifted”.[xxxv]

In addition, the ‘Intervention of United National Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression before the European Court of Human Rights’ on 20 October 2017 concerned ten applications to the Court regarding journalists that have been arrested and/or detained under counter-terrorism laws and state-of-emergency decrees in Turkey. The brief presents a pattern of abuses of the applicable international norms pertaining to freedom of speech to demonstrate that Turkey's limits on freedom of expression, as guaranteed by Article 10, are not "prescribed by law".[xxxvi]

Amnesty International also carried out a study which details a variety of human rights violations perpetrated in Turkey during the state of emergency, with a focus on the capacity of human rights defenders and non-governmental organizations (NGOs) to carry out their work. Increased arbitrary imprisonment, abusive anti-terrorism prosecutions, the use of emergency rule to close NGOs, rising cases of intimidation to silent opposition, and unjust limitations on the right to freedom of assembly are all highlighted in the report. Amnesty stated that “[a] chilling climate of fear is sweeping across Turkish society as the Turkish government continues to use the state of emergency to shrink the space for dissenting or alternative views.”[xxxvii]

Therefore, since the Governorship’s measures infringed by the group of lawyers had already been issued many times during the state of emergency, it can be inferred that these measures might not be in line with the requirement of “prescribed by law” under paragraph 2 of Article

10 ECHR. There is no evidence that indicates that the measures were necessary in a democratic society or that were enacted in the interest of national security at that time. For this reason, the interference with the right to freedom of expression of the seven lawyers could amount to a violation of Article 10 ECHR. In fact, it seems more likely that the right to freedom of expression of the lawyers was restricted with the purpose of shrinking the political space for dissenting opinions. This could lead to a violation of Article 18 ECHR as this provision forbids the use of rights restrictions and allows the Court to examine whether criminal proceedings have been twisted into instruments of suppression that appear to be lawful.[xxxviii]

3.3.4 Article 11 ECHR

The right to freedom of assembly and association is prescribed by Article 11 ECHR.[xxxix] In this case, the right to freedom of assembly and association is closely linked to the right to freedom of expression.[xl] The significance of the right to peaceful assembly and its relationship to the right to free speech has often been highlighted in the ECtHR case law:

"The link between Article 10 and Article 11 is particularly relevant where the authorities have interfered with the right to freedom of peaceful assembly in reaction to the views held or statements made by participants in a demonstration or members of an association (*Primov and Others v. Russia*, 2014, § 92; *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, 2001, § 85)."[xli]

Assembly is a form of expression. Many instances in which opinions were expressed during an assembly, including sit-in actions, have been examined under Article 11 ECHR:

"Installation of a banner on a wall during a demonstration was examined under Article 11 alone (*Akarsubaşı and Alçiçek v. Turkey*, 2018, §§ 31-33; cf. *Olga Kudrina v. Russia*, 2021, § 49, where similar actions were examined under Article 10 when they were combined with throwing political leaflets out of the window), as was the making of *public statements to the press near judicial buildings in defiance of the legislative ban on doing* so (*Öğrü v. Turkey*, 2017, § 13). Likewise, a series of protest actions including a press conference, a procession and a sit-in, all linked to a single campaign, was examined under Article 11 (*Hakim Aydin v. Turkey*, 2020, § 50). A penalty for shouting slogans and holding banners during a demonstration on account of their content is considered an interference with the right to freedom of peaceful assembly under Article 11 (*Kemal Çetin v. Turkey*, 2020, § 26)."[xlii]

According to the indictment, the protestors acted against the measures of the Governor and disobeyed the orders. In principle:

"[a] prohibition on holding public events at certain locations is not incompatible with Article 11, when it is imposed for security reasons (*Rai and Evans v. the United Kingdom* (dec.), 2009) or, as the case may be in respect of locations in the immediate vicinity of court buildings, for protecting the judicial process in a specific case from outside influence, and thereby protecting the rights of others, namely the parties to judicial proceedings".[xliii]

However, "[t]he latter *ban should be tailored narrowly to achieve that interest* (*Lashmankin and Others v. Russia*, 2017, § 440; *Öğrü v. Turkey*, 2017, § 26)".[xliv] Therefore, restrictions placed on peaceful assemblies, even when there is a risk that the assembly might result in disorder, must be in conformity with paragraph 2 of Article 11 ECHR. States have a positive obligation to secure the effective enjoyment of these rights and must refrain from applying unreasonable restrictions on the right to peaceful assembly.[xlv]

In this case, the right to freedom of assembly of the lawyers is interfered with twice, during the Justice Watch by the Governorship's measures and after the Justice Watch by the sanctions imposed and the criminal indictment. In fact:

"the term "restrictions" in Article 11 § 2 must be interpreted as including both measures taken before or during a gathering and those, such as punitive measures, taken afterwards (*Ezelin v. France*, 1991, § 39). For instance, a prior ban can have a chilling effect on the persons who intend to participate in a rally and thus amount to an interference, even if the rally subsequently proceeds without hindrance on the part of the authorities (*Bączkowski and Others v. Poland*, 2007, § 66-68)".[xlvi]

"There are two types of restrictions, each giving rise to a range of legal issues. The first type comprises conditions on the exercise of the right to freedom of assembly, in particular rules on the planning and conduct of an assembly imposed through mandatory notification and authorisation procedures. Restrictions of this type are mainly addressed to the assembly organisers. The second type of restrictions comprises enforcement measures such as crowd-control, dispersal of an assembly, arrest of participants and/or subsequent penalties".[xlvii]

Interference of any kind with the right to peaceful assembly is a violation of Article 11 unless it is "prescribed by law," pursues one or more legitimate goals under paragraph 2, and is

"necessary in a democratic society" for the attainment of the goals at issue.[xlviii] Furthermore, the proportionality of the measures must be considered taking into account the chilling effect:

"[i]n particular, a prior ban of an assembly may discourage the participants from taking part in it (*Christian Democratic People's Party v. Moldova*, 2006, § 77)."[xlix]

"A chilling effect may remain present after the acquittal or dropping of charges against the protestors, since the prosecution itself could have discouraged them from taking part in similar meetings (*Nurettin Aldemir and Others v. Turkey*, 2007, § 34)."[l]

"The subsequent enforcement measures, such as the use of force to disperse the assembly, the participants' arrests, detention and/or ensuing administrative convictions may have the effect of discouraging them and others from participating in similar assemblies in future (*Balçık and Others v. Turkey*, 2007, § 41). The chilling effect is not automatically removed even if the enforcement measure is reversed […] (*The United Macedonian Organisation Ilinden and Ivanov v. Bulgaria*, 2005, § 135)."[li]

As to the first interference, the Governorship's measures might have a chilling effect on the right to freedom of assembly and could be disproportionate to the aim they want to achieve. Furthermore, the fact that they were issued many times during the state of emergency can be an argument as to whether or not these measures are prescribed by law or necessary in a democratic society as envisaged under paragraph 2 of Article 11 ECHR.

As to the second interference, which includes the sanctions, the criminal investigation and the following indictment, the nature and the severity of the measures need to be considered when assessing the proportionality of an interference:

"[w]here the sanctions imposed on the demonstrators are criminal in nature, they require particular justification (*Rai and Evans v. the United Kingdom* (dec.), 2009). A peaceful demonstration should not, in principle, be rendered subject to the threat of a criminal sanction (*Akgöl and Göl v. Turkey*, 2011, § 43), and notably to deprivation of liberty (*Gün and Others v. Turkey*, 2013, § 83). Thus, the Court must examine with particular scrutiny the cases where sanctions imposed by the national authorities for non-violent conduct involve a prison sentence (*Taranenko v. Russia*, 2014, § 87)".[lii]

In the *Ogru and others v. Turkey* case the ECtHR decided that the Turkish government breached freedom to demonstrate by imposing fines on demonstrators without proper judicial scrutiny.[liii] The Ogru case presents a similar scenario to the one at hand. The applicants had taken part in peaceful demonstrations in Adana province between December 2009 and April 2010, some of which were preceded or accompanied by sit-ins. Under a Gubernatorial Decree of November 2009, the three applicants were ordered to pay administrative fines of 143 Turkish Lira on several occasions. Considering Articles 10 and 11, the applicants claimed that their fines violated their rights to freedom of expression and peaceful assembly guaranteed by the Convention. The ECtHR reasoned that the national courts failed to perform the required balancing act between the right to freedom of assembly and the necessity and proportionality of the interference. Instead, they only checked the factual accuracy of the charges, namely that the applicants took part in the demonstrations and acted against the decree.[liv] The ECtHR concluded that the fines were not subjected to adequate judicial review and that there had been a violation of Article 11 ECHR. The Turkish government violated the right to freedom of assembly by imposing fines on demonstrators.[lv]

Similarly, in the *Yılmaz Yıldız and Others v. Turkey* case a fine was imposed on the applicants for attending meetings and reading out press statements, contrary to police officer's orders. They complained that this constituted an interference with their rights to freedom of assembly and freedom of expression.[lvi] The Court observed that the applicant's intention was to debate on matters of public interest and they held a peaceful demonstration in one of the areas prohibited by the authorities. The police informed them that the gathering was illegal but the applicants continued to read out the press statements. The three applicants were prosecuted and subsequently sentenced to pay administrative fines. The Court stated that the proportionality principle requires that a balance be struck between the requirements listed in Article 11 § 2. Hence, a peaceful demonstration should not be made subject to the threat of a penal sanction (see *Akgöl and Göl v. Turkey*, nos. 28495/06 and 28516/06, § 43, 17 May 2011). The Court concluded that Turkey violated Article 11 of the Convention[lvii]:

"the prosecution of the applicants and the imposition of administrative fines for their participation in a peaceful demonstration were disproportionate and not necessary for maintaining public order within the meaning of the second paragraph of Article 11 of the Convention (*see Gün and Others v. Turkey*, no. 8029/07, §§ 77-85, 18 June 2013)."

It can be concluded that the right to freedom of assembly was interfered with when the Justice Watch was restricted by the Governorship's measures and subsequently, by the imposition of fines and the criminal investigations. Following the reasoning of the Court in similar cases, these interferences, especially the imposition of fines, violates Article 11 ECHR as the fines are disproportionate, not necessary in a democratic society and create a chilling effect on the right to assembly. Furthermore, the Governorship's measures might also not comply with the requirement "prescribed by law" as the same measures were issued many times during the SoE.

Article 34 of the Turkish Constitution protects the right to hold peaceful meetings and demonstrations without prior permission. This and the available restrictions provided for in the Constitution are in line with Article 11 ECHR.[lviii] However, it is reported that:

"Secondary legislations are mostly in breach of the Constitution and international standards, because they establish arbitrary limitations like execution of the notification obligation in the form of permission or granting police forces with excessive use of power or delegating governors' the authority to decide whether the protest is lawful or not before the free exercise of the freedom of assembly. Besides, the conditions foreseen for banning, postponing or terminating a meeting or demonstration are drafted in a very vague manner in these secondary legislations, causing forth arbitrariness in restriction of the exercise of freedom of assembly".[lix]

The Governorship's measures at hand seem to be part of secondary legislations that violate the Constitution and international standards. As a result, the fines should be lifted and the measures revised. That way, the seven lawyers from the Adana BA, and also all the other citizens, can fully appreciate the right to freedom of assembly.

3.3.5 UN Guidelines on the Role of Prosecutors

Principles 10 to 20 in the UN Guidelines on the Role of Prosecutors (UN Guidelines) outline the role of the prosecutors in criminal procedures.[lx]

According to Principle 12 UN Guidelines: "prosecutors shall in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system".[lxi] The prosecution of the suspects is an act contrary

to the respect and protection of human dignity, as the freedom of assembly and the freedom to demonstrate have not been taken into account at all.

Principle 13/a of the UN Guidelines states that in the performance of their duties, prosecutors should: "Carry out their functions impartially and avoid all political, social, religious, racial, cultural, sexual or any other kind of discrimination".[lxii] The prosecution of the suspects seems to be a decision taken in extent to the Governorship's orders, which implies that the function of the prosecutor is not carried out impartially.

According to Principle 13/b of the UN Guidelines the prosecutor shall: "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".[lxiii] The prosecution of the suspects can be seen as a violation of the protection of the public interest, namely that fundamental rights of journalists and their lawyers are respected.

The International Association of Prosecutors, which was established in 1995, has issued a set of standards to ensure "fair, effective, impartial and efficient prosecution of criminal offences" in all justice systems.[lxiv] According to these standards, a prosecutor should only initiate criminal proceedings if "a case is well-founded upon evidence reasonably believed to be reliable and admissible, and will not continue with a prosecution in the absence of such evidence."[lxv] The fact that there is no evidence on mitigating factors and that the indictment includes no information on the freedom of speech and the freedom of assembly, could indicate that these standards were violated.

3.3.6 UN Basic Principles on Role of Lawyers

In analysing the indictment, attention must finally be paid to the UN Basic Principles on the Role of Lawyers.[lxvi] Firstly, principle 16 includes that:

"Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other

sanctions for any action taken in accordance with recognized professional duties, standards and ethics”.[lxvii]

Additionally, principle 23, “Freedom of expression and association”, merits close consideration:

“Lawyers like other citizens are entitled to freedom of expression, belief, association and assembly. In particular, they shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights and to join or form local, national or international organisations and attend their meetings, without suffering professional restrictions by reason of their lawful action or their membership in a lawful organisation. In exercising these rights, lawyers shall always conduct themselves in accordance with the law and the recognized standards and ethics of the legal profession.”[lxviii]

In light of these Articles and given the above analysis, the lawyers’ sit-in action and the press release referred to in the indictment would merit protection instead of prosecution, especially since the actions related to the potential unlawful arrest of their colleagues.

4.) Conclusions and Recommendations

In the Netherlands, the defence could argue an indictment with similar flaws as the one issued against the seven lawyers to be void, in particular because it is not clear which specific measure was breached or which specific order was disobeyed. The prosecutor has the possibility to file a motion to amend the indictment at any time during the proceedings to restore any defects. The prosecutor is usually granted considerable leeway to file this motion, which is easily granted by the court. However, if such a motion is not filed or denied and the court rules that the indictment is void, this would imply that the indictment is invalid (either in whole or in part). This is a final decision, which ends the prosecution and means that no ruling on the merits of the case will be provided. The prosecutor must then file a new and improved indictment.

In addition, the defence could also claim that the allegation in the indictment cannot be proven and/or does not amount to a criminal offence, requesting the court for an acquittal or discharge of further prosecution. Arguments for this position are the lack of elements of the crime in the indictment and the lack of the specification of the respective measure or order at hand, which would force a Dutch court to rule that that the allegation does not qualify as a crime. After a ruling of acquittal or discharge, the prosecutor cannot initiate a new proceeding

for the same crime, due to the *ne bis in idem* principle (which prohibits being prosecuted twice for the same offence).

To improve the quality of the indictment, the following steps can be taken:

- Keep the wording of the indictment simple and brief, so that the content of the indictment is easier to understand;
- Mention the issue date of the indictment at the beginning together with the formalities;
- Include paragraphs in the indictment as to make its content logical and comprehensible. Avoid long sentences that are solely separated by a semicolon;
- Clearly mark the evidence in the indictment, i.e., by whom certain documents were drafted, and include the date of the pieces of evidence;
- Include each element in the indictment and connect each piece of evidence to one or more elements of the alleged crime;
- Include evidence that is in favour of the defendant;
- Clearly indicate the penalties and/or measures that can be foreseen;
- Clearly refer to the governor's order on which the criminal investigation and the indictment were based;
- Evaluate whether the indictment is in line with ECHR rights, such as the right to a fair trial and the right to freedom of speech and assembly.

In conclusion, the flaws in the indictment of the suspects cause serious concern for the guarantees of fairness and transparency of judicial proceedings in Turkey, as protected by the European Convention on Human Rights. We therefore urge the Turkish Ministry of Justice to take our recommendations into consideration, by training public prosecutors about the conditions set out in Article 170 TCPC. Additionally, we note that the ultimate outcome of these cases (i.e., acquittals) should be communicated throughout the Turkey Ministry of Justice, so that prosecutors are made aware of these precedents and the low success rate of the indictments issued. The criminal investigations impacted the everyday life of the lawyers for several years. They were designated as suspects since 2017 and definitely acquitted on 7 December 2020. During that time, they faced multiple problems with the administration solely because their name popped up the system in relation to a criminal case. Given these consequences, the decisions to initiate the criminal investigations against the lawyers should have been made more carefully.

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Lawyers for Lawyers ("L4L") is an independent and non-political Dutch foundation that seeks to promote the proper functioning of the rule of law by pursuing freedom and independence of the legal profession. Lawyers for Lawyers was granted Special Consultative status with the UN Economic and Social Council in July 2013.

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