

# **PEN NORWAY**

**Legal report on indictment:**

**Can Dündar & Erdem Gül**

**PEN Norway Turkey Indictment Project**

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## 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](http://norskpen.no).

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

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## 1.) Introduction and Summary of the Case and the Indictment

1. This legal report is drafted by Tony Fisher as part of the PEN Norway Turkey Indictment Project, established by PEN Norway, and represents an analysis of the indictment in the case of defendants Can Dündar and Erdem Gül. The focus of this report will be on the indictment as it relates to Can Dündar but most of the commentary will apply equally to fellow journalist Erdem Gül.

2. Can Dündar is a renowned journalist from Turkey who has been a respected political and journalistic commentator for the last 40 years, working for several newspapers and magazines in Turkey. He has produced many TV documentaries focusing particularly on modern history of the Republic of Turkey and cultural anthropology. He worked as an anchorman for several news channels. He has worked in the Yankı, Hürriyet, Nokta, Haftaya Bakış, Söz and Tempo media outlets since 1979. He was in the program crew of 32. Gün (32nd Day) from 1989 to 1995. 32. Gün was a national and international television news show launched in 1985 and was Turkey's longest-running programmes as well as being one of the most influential news programmes. Most recently Mr Dündar was the editor in chief of the daily Cumhuriyet newspaper in Turkey. Dündar has been the recipient of a number of awards and honours including:

- 2016 [CPJ International Press Freedom Awards](#)
- 2016 [Oxfam Novib/PEN Award](#)
- 2017 Best European Journalist of the Year, [Prix Europa](#)

3. He is also an honorary member of PEN Norway.

4. On 29 May, 2015 Dündar published an article in Cumhuriyet entitled “Here are the weapons Erdoğan claims do not exist”, alleging that Turkey’s National Intelligence Organization (MİT - Millî İstihbarat Teşkilâtı) had been delivering arms to rebels in Syria. Cumhuriyet also published a video and photos supporting the claim. On 12th June 2015 Gül wrote another article concerning the same issue and supporting the same claim.

5. Following this, the president of Turkey President Erdoğan publicly stated that they would ‘not get away with it’ and on November 26, 2015, they were arrested and held in pre-trial detention on charges of willingly aiding an armed terrorist organisation without being a member of it.

6. The suspects Gül and Dündar applied to the Constitutional Court of the Republic of Turkey demanding to be released on the grounds that their pre-trial arrest was unconstitutional and that their lawyers had been unable to examine their files. They cited the 2014 European Court of Human Rights decision of *Ahmet Şık and Nedim Şener v. Turkey*<sup>i</sup>, in which the Court found that Turkey had violated the right to freedom of expression and the right to a fair trial.

7. Dündar and Gül were held in Turkey's Silivri prison for 92 days until the Constitutional Court ruled in their favour on the 25 February 2016 (the "CC Judgement"), recognizing that their rights to personal liberty and security together with their rights to freedom of expression were infringed under Articles No. 19 (the right to personal liberty and security), 26 (the right to express and disseminate one's thoughts and opinions) and 28 (freedom of the press) of the Constitution of the Republic of Turkey. As a result, they were released on February 26, 2016, despite the fact that the President of the Republic of Turkey stated that he would neither recognize nor obey the Constitutional Court's ruling. He further noted that Turkey is ready to pay compensation if an upper court's decision – detaining the two journalists again – was appealed before the European Court of Human Rights. "The State can object to the European Court of Human Rights if it gives a decision supporting the Constitutional Court or it can pay the compensation", he said<sup>ii</sup>.

8. The findings of the Constitutional Court are relevant for the purposes of the analysis of the indictment (which was not available at the time the Constitutional Court delivered its judgement since it had not at that time been drafted). At paragraph 76 of the CC Judgement the court concluded that the main facts on the basis of which the decision to arrest the applicants was made was the publication of the two news reports in Cumhuriyet newspaper in relation to the immobilization and searching of the MIT trucks referred to in paragraph 3 above. The judgement went on to confirm that the facts which were contained in the two articles in question were already in the public domain since they had previously been published by another publication on 21 January 2014, some 15 months earlier. It is worth quoting the reasoning of the Constitutional Court at this stage on the basis of which they ruled that the suspects' right to personal liberty and security enshrined by Article 19/3 of the Constitution had been violated:

76. ... Although the arrest warrant stated that the current state of evidence regarding the alleged crimes was sufficient for the arrest, it mentioned no concrete evidence other than the aforementioned news reports. The applicants were accused of and arrested for publishing the photographs and information presented in the reports with the aim of "aiding an armed terrorist organisation knowingly and willingly, without becoming a member of it" and for obtaining and disclosing them "with the aim of political and military espionage". The reasoning of the arrest warrant, however, did not provide any explanations as to which concrete facts about the applicants led to the assumption of such a strong criminal suspicion that the news reports in question were published "with the aim of political and military espionage". Regarding the strong criminal suspicion of "aiding an armed terrorist

organization knowingly and willingly without becoming a member of it", which was mentioned in the warrant as the reason of arrest, no concrete facts were presented to support the allegation that they were aiding [the terrorist organization] other than the opinion that the applicants, "by their profession, were supposed to know that" the reports they published "were about a terrorist organization that was under investigation".

77. On the other hand, a newspaper report published on 21/1/2014, two days after the incident when the trucks were immobilized and searched, included a photo and some information regarding the materials allegedly carried by the trucks ..... Aside from the abstract public debate about the quality of the cargo that the trucks hauled, the fact that a similar photograph and information were already published approximately sixteen months before the reports in question and that they were easily accessible as of the date of the review of the application file, must be taken into account while determining the existence of a strong criminal suspicion required for the arrest.

78. Therefore, when presenting the measures against a news report, it is important to provide a reasoning as to whether such a threat to the national security still persists if the news reports are published by another newspaper later on with similar elements and photographs that the previous reports already featured. (For the ECHR decision on the republication of previously published confidential information about the national security, see: *Observer and Guardian/The United Kingdom*, App. no: 13585/88, 26/11/1991, §§ 66-74).

9. The Constitutional Court also noted that during the six month period between the date when the investigation against the defendants had started and the date on which they were summoned to give their statements in November 2015:

80..... the Office of the Chief Public Prosecutor's Office of Istanbul did not collect the statements of the applicants nor did it take measures such as detention or arrest. Neither the questions asked during the statement collection nor the reasoning of the arrest warrant make it clear what evidence -other than the news reports that were published- was obtained during that time period that linked the applicants to the charged crime.

10. The reasoning of the Constitutional Court is very relevant to any analysis of the indictment. It seems clear that the Constitutional Court did not feel that the facts made out by the prosecutor justified any prosecution on the grounds it was made and the prosecutor who participated in the hearings should have withdrawn the charges when its decision was announced.

11. It is also relevant because even if the prosecutor had been justified in continuing the prosecution after the decision had been handed down by the Constitutional Court the

prosecutor who participated in the hearings was clearly under a duty to balance the allegations made in the indictment with these comments which had been made by the Constitutional Court.

12. Dündar stepped down from his post as the editor in chief of the daily Cumhuriyet newspaper in August 2016, after he was sentenced to 5 years and 10 months of imprisonment for the crime of “disclosing documents of the state, that due to their nature, must be kept confidential” under Article 329(1) of the Turkish Criminal Code. This is not one of the charges listed in the indictment. The Court of Cassation subsequently decided that these charges under Article 329/1 should be dismissed due to Article 26 of the Press Law. The first instance court was ordered to focus on the charge under Article 328 of the Turkish Criminal Code. After this decision the first instance court merged the cases (which had been separated in May 2016) and eventually, in December 2020 Mr Dündar was convicted under Articles 220/7 and 328. That decision has now been appealed to the Court of Cassation.

13. On the day Dündar received his first sentence (May 2016), he was assaulted by a gunman at the courthouse. He was unhurt but subsequently left Turkey for Germany. He is currently a columnist for German daily Die Zeit and commentator for German WDR’s Cosmo. He founded the news website called Özgürüz (We are Free).

14. At the time of their arrest on 26<sup>th</sup> November 2015 Dündar and Gül were charged (according with the wording of the indictment) with:

Obtaining state secrets for the purposes of political and military espionage, revealing information relating to the state security for the purposes of espionage, seeking to overthrow the government by force and violence or seeking to partially or completely obstruct the conduct of its operations, willingly aiding an armed terrorist organization without being a member of it.

15. The charges were expressed to be under Articles 314/2, 328/1, 330/1, 312/1, 53, 63/1 and 58/9 of the Turkish Penal Code by the implication of the Article 220/7 of the Turkish Penal Code and the Article 5 of the Law No. 3713. The conviction was secured in May 2016 under article 329, not listed in the indictment. As stated this charge was overturned by the Court of Cassation. The trial continued however in relation to the charges under Article 328 and 220/7 “willingly aiding an armed terrorist organisation without being a member of it” which reads as follows:

(Amended on 2/7/2012 - By Article 85 of the Law no. 6352) Any person who aids and abets an organisation knowingly and willingly, although he does not belong to the structure of that organisation, shall also be sentenced for the offence of being a member of that organisation. The sentence to be imposed for being a member of that organization may be decreased by one-third according to the assistance provided.

16. I will comment on the legality of proceeding with this separate case on the basis of the same facts later.

17. The evidence on the basis of which these charges were made is summarised in the indictment in the following (entirely vague) terms:

Letters of criminal complaint, examination and statement records, review, investigation and evaluation records, the report prepared by Terrorism Department and the whole investigation document.

18. The indictment is 437 pages long. I have not seen a translation of the whole of the document. Large sections of the indictment relate to other cases against other suspects or defendants in relation to different or similar alleged offences and clearly have no relevance to the guilt or innocence of these suspects. The first substantive reference to the suspects appears on page 72 where it is stated that:

“This Indictment against the suspects Can Dündar and Erdem Gül is organised under the following chapters;

- the coup attempt of 17<sup>th</sup> 25<sup>th</sup> of December and **the task given to the suspects** by the FETÖ/PDY terrorist organisation in this process;
- immobilisation of the aid trucks of the National intelligence organisation and **the task given to the suspects** by the FETÖ/PDY terrorist organisation in this process;
- terrorist attacks in Reyhanli and Cilvegözü and **the task given to the suspects** by FETÖ/PDY terrorist organisation in connection with these attacks; and
- the review and assessment of the actions of suspects through the lens of criminal law.”

19. The emphasis has been added in the above summary. In essence, the allegations against each of the suspects are that they had been instructed by a terrorist organisation (FETÖ/PDY) to carry out three different tasks for them. The evidence which is adduced in support of these allegations consists almost entirely of quotations from articles written by Dündar and Gül about each of the three incidents described in the indictment. No factual evidence is adduced with regard to the way in which these alleged tasks had been allocated to the suspects, or the individuals who are alleged to have allocated these tasks. Nor is there is any documentation or other evidence adduced to indicate that such tasks had in fact been allocated. There are extensive quotations from journalistic reports written by Dündar, but no evidence to demonstrate that those reports were written on the instruction of any third party. I will deal with each of these incidents in turn:

## 20. The Alleged Coup Attempt 2013:

- a. Between December 17 and December 25, 2013, a criminal investigation was undertaken in Turkey which involved several key people in the Government of Turkey. It was reported that 52 people were detained on 17 December and it was alleged that they were connected in various ways with the ruling Justice and Development Party. Allegations were made against a number of family



members of Cabinet ministers of bribery and corruption and fraud, money laundering, and gold smuggling. Subsequently, then Prime Minister Recep Tayyip Erdoğan announced the reshuffle of 10 members of his cabinet and his government dismissed or reassigned thousands of police officers and hundreds of judges and prosecutors, including those leading the investigation, and passed a law increasing government control of the judiciary. The case against the defendants was subsequently dismissed.<sup>iii</sup>

b. After the dismissal of the principal prosecutor, Celal Kara, Dündar interviewed him. Extensive quotations are contained within the reviewed indictment of the answers given by Mr Kara to the questions posed by Mr Dündar during his interview. None of these quotations evidence any motive on the part of Mr Dündar other than to provide journalistic reports of the facts and events related by Mr Kara.

## **21. Immobilisation of the aid trucks of the National intelligence organisation National Intelligence Organisation (MİT):**

a. On 29 May, 2015 Cumhuriyet published an article and video evidence indicating that security forces had been discovered emptying weapons parts being sent to Syria on trucks belonging to the MİT state intelligence agency. The footage showed gendarmerie and police officers opening crates on the back of the trucks which contain what the article described as weapons and ammunition. The article stated that the video was from Jan. 19, 2014 but did not say how it had obtained the footage.

b. A further article was subsequently published on 12 June 2015.

c. There had been previous reports that witnesses and prosecutors had alleged that MİT helped deliver arms to parts of Syria under Islamist rebel control during late 2013 and early 2014, quoting a prosecutor and court testimony from gendarmerie officers.

d. Other reports of the interception of the vehicles in the press had appeared internationally at the time of the incident and the facts and evidence concerned were in the public domain.

e. In a report published by international press agency Reuters they indicated that they could not verify the authenticity of the video footage, but the license plates on several of the vehicles matched those given in witness testimony seen by Reuters relating to the Jan. 19 search in the southern province of Adana.

f. President Tayyip Erdoğan was reported as having said the trucks stopped that day belonged to MİT and were carrying aid to Turkmens in Syria. He allegedly said prosecutors had no authority to search MİT vehicles and were part

of what he calls a “parallel state” run by his political enemies and bent on discrediting the government.

g. The state-run Anadolu News Agency said the Istanbul chief prosecutor’s office had launched an investigation into Dündar under counter-terrorism laws after the footage was published on its website.

h. Syria and some of Turkey’s Western allies were reported to have said that Turkey, in its haste to see President Bashar al-Assad toppled, let fighters and arms go over the border to hard-line Islamist rebel groups in Syria.

i. Ankara denied arming Syria’s rebels or assisting hard-line Islamists. Diplomats and officials from Turkey stated it had in recent months imposed tighter controls on its borders.<sup>iv</sup>

j. In the indictment there are very detailed descriptions of the investigations carried out at the time the vehicles were intercepted and various allegations are made against the members of the security forces who intercepted the vehicles that they were acting in concert to embarrass the state in front of visiting ambassadors. The report in Cumhuriyet was published some 16 months later. Allegations are made in the indictment that the reports made “were in line with the FETÖ/PDY Armed Terrorist Organization’s ultimate aim of ensuring, based on the false denunciations and evidence, that the State of the Republic of Turkey is put on a trial in the International Penal Tribunal, through an effort to misrepresent it as a country that aided terrorism.” This allegation is repeated in various different parts of the indictment but no evidence is identified to establish the truth of the allegation.

k. There are also extensive quotations from articles written by Dündar prior to the publication of the May and June 2015 articles. These are articles which relate to entirely unrelated aspects of society in Turkey. There is no cogent or credible explanation as to why these articles have any relevance whatsoever to the charges put under the terms of the indictment.

## **22. Terrorist attacks in Reyhanli and Cilvegözü:**

a. on 11 May 2013 twin car bombs killed over 50 people in the Turkish town of Reyhanli, near the Syrian border.<sup>v</sup> In another attack in Cilvegözü at a border gate a further 17 people were killed.

b. The indictment contains a detailed examination of the investigation in relation to these attacks and refers to the witness statements which were taken at the time. It does not however relate these in any way to any activities undertaken by either of the suspects. Extracts from unrelated articles are included and in the middle of the text relating to the investigation Mr Dündar’s

name is mentioned. However, it is not related to any facts which involve him in any way with the activities leading to the bombings or with the bombings themselves, or with any publications arising out of the bombings. There is much description of a theory that members of the MIT were aware of the attacks prior to them taking place and reference to an article where Mr Dündar makes reference to this.

c. After these extracts the indictment goes on to present the following analysis:

**“THE REVIEW AND ASSESSMENT OF THE ACTIONS OF THE SUSPECTS THROUGH THE LENS OF PENAL CODE**

This section is organized under the following main titles:

- 1) AIDING AND ABETTING THE FETÖ/PDY ARMED TERRORIST ORGANIZATION KNOWINGLY AND WILLINGLY WITHOUT BECOMING A MEMBER OF IT,
- 2) A. POLITICAL AND MILITARY ESPIONAGE, DISCLOSURE OF INFORMATION (STATE SECRET) THAT SHOULD REMAIN CONFIDENTIAL,  
B. SEEKING TO OVERTHROW THE GOVERNMENT OF TURKISH REPUBLIC BY FORCE AND VIOLENCE OR SEEKING TO PARTIALLY OR COMPLETELY OBSTRUCT THE CONDUCT OF ITS OPERATIONS

(the capitalisation of this summary is in the original indictment).

d. This summary is followed by an extensive academic analysis of the subject of terrorism which appears to have been copied and pasted from various publications. In some cases these sections end abruptly mid-sentence suggesting that the full passage has not been copied. The summary is followed by a variety of allegations against Fetullah Gülen with references to various television programmes and a description of various offences under the Turkish criminal code many of which are articles relating to offences which the suspects had not been charged with. I quote one passage below to illustrate the irrelevant nature of much of the content of the indictment:

It is understood that all the speeches by Fetullah Gulen, the leader of the organization, were made for a specific purpose and aim, that he sent some messages to the members of the organization and instructed them to take the necessary actions to achieve the ultimate purpose of the organization.

The TV series titled “Sefkat Tepe” [Kindness Hill], whose plots are written on the orders and approval of the suspect Fethullah Gulen, featured the scenes referred as “Dark Council” or “Council of Decisionmakers” where the phrase “Muta” [“Fornication”] was constantly mentioned. In his speeches, Fetullah Gulen highlighted the issue of “Muta” and the columns of Gultekin Avci, a columnist in a

newspaper called Bugün, systematically discussed the issue of “Muta Marriages” [a sham marriage that is believed to make non-marital sexual intercourse permissible]. One of the charges attributed to the suspects in the investigation no. 2011/762 was “Muta” (“act of compelling prostitution” according to the suspects’ statements). When the personal identification report written for one of the victims in the file and the points made above are taken as a whole, it can be seen that the phrase “Muta” was featured by the series titled “Sefkat Tepe” and the columnists only after the suspect Fetullah Gulen used it for the first time. In parallel to that, it is understood that among the charges attributed to the suspects in the investigation no. 2011/762 was the phrase “Muta (“act of compelling prostitution” according to the suspects’ statements)”, which they tried to link with the victims.

## 2.) Analysis of the Indictment

23. The indictment, despite its considerable length, does not contain a succinct statement of the facts. It is essentially a compilation of apparently random references to publications authored by Mr Dündar and Mr Gül over a number of years and contains substantial volumes of information and evidence which either:

- a. has no connection with the allegations made against them (because it relates to other investigations or prosecutions);
- b. has no relevance to the particular case but is simply an academic analysis of the concept of terrorism;
- c. relates to the investigation of other crimes which the defendants are not alleged to have committed; or
- d. analyses offences which the defendants have not been charged with.

24. At the heart of the indictment is the allegation that both suspects were allocated “tasks” by the Gülen organisation to bring the state into disrepute and the publication of journalistic articles disclosing possible wrongdoing on the part of politicians and government officials amounted to a performance of these tasks. These allegations are repeated throughout the indictment (often in shouting CAPITAL LETTERS). However, no evidence is advanced that the publication of these articles was influenced or encouraged by any third party.

25. In their own statements to the prosecutor the indictment confirms that they denied any such allegations. Mr Dündar confirmed to the prosecutor (and I quote from the indictment) that:

he was reporting without any other purpose,” and that “the images were previously published by another newspaper”. When asked orally about “if the previously published images were newsworthy”, he stated that “the images he published were different and newsworthy”. When asked about “if he has any information and documents that indicated that the aid trucks were sent

to any organization”, he stated that he has no such information or documents but that was what he heard”. Likewise, the suspect Erdem Gül stated that “he had no purpose other than journalism.” As can be understood from the statements, despite the fact that the suspects didn’t have any concrete information or documents, they still attempted to link the state and the government of the Republic of Turkey with terrorism, using the images handed over to them by the FETÖ/PDY Terrorist Organization, through some middlemen. And in line with their purpose, they have written unreal/fictitious articles knowingly and systematically.

26. The allegation therefore appears to be that the information which the suspects received and which was published in the newspaper had been secured from a terrorist organisation “through some middlemen.” No evidence is found anywhere in the indictment to identify who these middlemen were, or to demonstrate how any instructions had been given.

27. As with so many indictments analysed by others who have produced reports for the PEN Norway project there is endless repetition, idealistic and academic theorising, and the expounding of conspiracy theories about Turkey and its reputation with the wider world but there is no cohesive and structured narrative linking the suspects with any factual basis on which they could reasonably be regarded as having committed the crimes they are charged with. This has made it almost impossible for the suspects to properly respond to the allegations against them. Their right to defend themselves adequately against facts which might indicate their guilt has been completely undermined by the introduction of hundreds of pages of irrelevant narrative.

### **3.) The Relevant Domestic Law**

28. The formal requirements in relation to the filing of a prosecution are set out in Article 170 of the Turkish Criminal Procedure Code. These include such things as identifying the suspect, defence counsel, the victim and the complainant. The complainants in this case are the President of Turkey (himself possibly impugned by the evidence published in Cumhuriyet) and the Undersecretariat of the National Intelligence Organisation (the organisation alleged to be responsible for shipping arms to terrorists in Syria). In most respects the indictment would seem to be compliant with Article 170. However, under article 170 (5) there is a requirement that “the conclusion section of the indictment shall include not only the issues that are unfavourable to the suspect, but also issues in his favour.” There is no mention of any favourable aspect of the case, and the lack of any direct evidence of either suspects’ association with any terrorist organisation is clearly a relevant factor which should from a procedural perspective have been included in the conclusion.

29. Paragraph 2 of article 170 requires that the evidence collected at the end of an investigation should constitute sufficient suspicion that a crime has been committed before an indictment is prepared. The decision of the Constitutional Court, which clearly found that the facts which were available were insufficient to find the Defendants guilty of any terrorist

offence was handed down in February 2016 and the indictment was prepared before this decision was available. However, any prosecutor is expected to be able to evaluate the same legal arguments. This is clearly relevant to the question of whether or not the prosecution should have proceeded and it seems the prosecutor failed in his duty under Paragraph 2 of article 170.

30. Finally article 170 (4) requires that “the events that comprise the charged crime shall be explained in the indictment in accordance to their relationship to the present evidence.” The confused narrative of the indictment clearly does not comply with this requirement. Interestingly Article 170(4) has very recently been amended (on 8 July 2021) and a new sentence has been added which mandates that “an indictment ... shall not give information that is not related to the events that constitute the alleged offence or to the evidence thereof.” The vast bulk of the indictment in this case relates to information which “is not related to the events that constitute the alleged offence or the evidence thereof.”

31. There is passing reference in the indictment to a ban on publication concerning the MİT trucks which was issued under Press law 5187 Article 3(2) by the Adana 5<sup>th</sup> Court of Peace Judgeship, on 14<sup>th</sup> January 2015, case file no. 2015/197. This ban prohibited the re-publication of the photographs and other information published in May 2016 in Cumhuriyet and publication could have amounted to an offence under the Press Law 5187 published on 26<sup>th</sup> June 2004. Under Article 11 of the Press Law the owner of the periodical in which the material is published is primarily liable for any breach although the editor can be punished in circumstances where the owner cannot be. Under Article 26 of the Press Law any prosecution is required to be commenced within four months of the publication of the offending materials. The indictment was issued just over six months from the publication of the MİT article and would appear to be out of time for any prosecution under the Press Law. Any such ban (especially in relation to the publication of facts which were already in the public domain) would in any event violate international standards concerning the freedom of the press which are referred to in the next section.

## **4.) Relevant International Standarts**

### **4.1) Freedom of Speech**

32. The case clearly raises fundamental issues regarding the right to journalistic freedom protected under Article 10 of the European Convention of Human Rights (“ECHR”). Whether or not there was a ban on publication of the relevant materials, in establishing whether or not there has been interference with the right to freedom of expression, there is no need to dwell on the characterisation given by domestic courts. Article 10 of the Convention applies to statements which seek to draw attention to unlawful or morally reprehensible conduct, and specific protection is provided for such statements in the case law of the European Court of Human Rights (“ECtHR”).

33. As a matter of general principle, the “necessity” of any restriction on the exercise of freedom of expression must be convincingly established (Sürek and Özdemir v. Turkey [GC],

para. 57<sup>vi</sup>; *Dilipak v. Turkey*, para. 63<sup>vii</sup>). The Court must determine whether the reasons adduced by the national authorities to justify the restriction are “relevant and sufficient” (*Barthold v. Germany*, para. 55<sup>viii</sup>; *Lingens v. Austria*, para. 40<sup>ix</sup>).

34. With particular regard to the disclosure of information received in confidence, the Court has emphasised that the concepts of “national security” and “public safety” need to be applied with restraint and to be interpreted restrictively and should be brought into play only where it has been shown to be necessary to suppress release of the information for the purposes of protecting national security and public safety (*Stoll v. Switzerland [GC]*, para. 54<sup>x</sup>; *Görmüş and Others v. Turkey*, para. 37<sup>xi</sup>).

35. The Court has consistently held that there is little scope under Article 10 para. 2 of the Convention for restrictions on political speech or debate (*Brasilier v. France*, para. 41<sup>xii</sup>) or on debate on matters of public interest (*Sürek v. Turkey (no. 1) [GC]*, para. 61; *Lindon, Otchakovsky-Laurens and July v. France [GC]*, para. 46<sup>xiii</sup>; *Wingrove v. the United Kingdom*, para. 58<sup>xiv</sup>). The information in the articles published by the suspects in this case was in any event already in the public domain.

36. The Court considers that the difficulties raised by the fight against terrorism do not in themselves suffice to absolve the national authorities from their obligations under Article 10 of the Convention (*Döner and Others v. Turkey*, para. 102<sup>xv</sup>). In other words, the principles which emerge from the Court’s case-law relating to Article 10 also apply to measures taken by national authorities to maintain national security and public safety as part of the fight against terrorism (*Faruk Temel v. Turkey*, para. 58<sup>xvi</sup>).

37. With due regard to the circumstances of each case and a State’s margin of appreciation, the Court must ascertain whether a fair balance has been struck between the individual’s fundamental right to freedom of expression and a democratic society’s legitimate right to protect itself against the activities of terrorist organisations (*Zana v. Turkey*, para. 55<sup>xvii</sup>; *Karataş v. Turkey*, para. 51<sup>xviii</sup>; *Yalçın Küçük v. Turkey*, para. 39<sup>xix</sup>; *İbrahim Aksoy v. Turkey*, para. 60<sup>xx</sup>).

38. Applying the courts approach to the facts of the present case it seems clear that the Court would not support attempts by the state to prevent dissemination of information and images tending to show the participation of state security forces and senior political figures in an operation to supply terrorists with weapons in a third country. Especially where that information was already in the public domain and had already been the subject of public debate.

39. During the investigations the indictment discloses that Mr Dündar and Mr Gül refused to disclose the source of the information which they had been supplied with and which was published in May 2016. The Court has on numerous occasions protected the right of journalists who have refused to disclose their sources. It appears that no order was obtained in this case from any domestic court to secure the release of this information but had any such

order been made it is likely that this would have been found to be a violation of article 10 of the Convention. See for instance *Voskuil v. the Netherlands*<sup>xxi</sup> where the Dutch government's interest in knowing the identity of the applicant's source had not been sufficient to override the applicant's interest in concealing it. The journalist had written for a newspaper concerning a criminal investigation into arms trafficking and was detained for more than two weeks in an attempt to compel him to disclose his sources.

#### 4.2) Right to a Fair Trial

40. The right to a fair trial is protected by both articles 5 and article 6 of the ECHR and articles 9 and 14 of the International Covenant on Civil and Political Rights ("ICCPR"). Turkey is a signatory to both instruments.

41. A fundamental component of the right to a fair trial is the right of any defendant to know the case against him and to challenge it. Without this knowledge he is unlikely to be able to effectively defend himself or give appropriate instructions to any lawyer instructed. Indeed, it is not possible to obtain evidence to support his defence if the defendant does not know the case against him.

42. This report is not an appropriate place to provide a full analysis of the deficiencies of the criminal justice system in Turkey both in relation to institutional requirements under Article 6 of ECHR and the procedural requirements under Article 6. Criticisms with regard to both have been made by academics, bar associations, NGOs and international institutions for a number of years.

43. The indictment presents a confusing and inchoate collection of facts, none of which point to the guilt of the suspects but which often relate to investigations undertaken by the state in secret, making it virtually impossible for the suspects to prepare effectively for their trial.

44. In this particular case there were also constant changes of judges throughout the very lengthy trial. One member of the judicial panel was arrested for alleged membership of the Gülen Organisation on 2 December 2016. The presiding judge was removed at a further hearing on 19<sup>th</sup> of December 2016. There were a multiplicity of hearings when various other cases were joined or removed. All of these factual issues are clearly of great concern when considering whether the court in these circumstances was capable of complying with the requirements of Article 6. These concerns are exacerbated by the closed hearings within which the presiding judge granted the request of the prosecutor of the court to admit president Erdoğan and the intelligence agency of Turkey as official complainants in the case despite protests by the defence that the move would jeopardise the independence and fairness of the trial. They were both potentially implicated in the wrongdoing which the defendants had reported. These are just some of the concerns which suggest that the institutional and procedural protections provided for by the ECHR were not respected.



45. There is one distinct facet of the trial which promotes even greater concern in relation to the treatment of Mr Dündar.

46. After his conviction in May 2016 under article 329 of the Turkish Penal Code the case in relation to the allegation that he had “aided an organisation without being a member of it” was separated and a further hearing took place on the 21 September, 2016 again at the Istanbul 14<sup>th</sup> assize Court to continue with this charge.

47. 21 further hearings took place between September 2016 and December 2020 when Mr Dündar was sentenced to 27 years and six months imprisonment on the charge of providing assistance to a terrorist organisation without being a member of it. Throughout this period Mr Dündar was in Germany.

48. It does not appear that any further factual evidence of any relevance to the charge was presented after Mr Dündar’s initial conviction in May 2016. Protocol number 7 to the ECHR entered into force in Turkey from first of August 2016<sup>xxii</sup>. From that date any Turkish indictment had to comply with article 4 (I):

no one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and appeal procedure of that State.

49. This provision prohibits successive prosecutions of defendants based on the same set of facts. However, the continued prosecution after the original conviction in May 2016 was exactly that. No new facts were presented. On this basis it appears that the continued prosecution of Mr Dündar after August 2016 was in breach of Turkey’s international obligations under Protocol 7. His conviction did not take place until December 2020.

### **4.3) The Impartiality and Fairness of the Prosecutor in the Proceedings**

#### **UN Guidelines on the Role of Prosecutors**

50. When discussing the question of whether or not the indictment and the conduct of the trial respects fair trial principles and procedures reference needs to be made to the UN Guidelines on the Role of Prosecutors (“UN Guidelines”) which outline the role of prosecutors in upholding the rule of law.

51. Principle 2 (b) requires that prosecutors “have appropriate education and training and should be made aware of the ideals and ethical duties of their office, of the constitutional and statutory protections for the rights of the suspect and the victim, and of human rights and fundamental freedoms recognized by national and international law”.

52. Principle 12 goes on to require prosecutors to perform their duties “fairly, consistently and expeditiously” in a way that upholds human rights and protects human dignity. Principle 13(a)

requires prosecutors to carry out their functions impartially and without discrimination, and 13(b) requires prosecutors to “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”.

53. As identified above the indictment contains no reference to matters (the clear lack of cogent evidence that the suspects had been allocated any “tasks” by a terrorist organisation) which clearly were to the advantage of the suspects. It is clear from this and from other cases that prosecutors (being under heavy political pressure themselves) seem unable to uphold the “ideals and ethical duties of their office” or discharge many of the other duties imposed on them by the UN Guidelines.

54. The Constitutional Court had in February 2016 made it clear that it did not consider it appropriate to pursue a prosecution against the suspects for merely reporting facts in the public domain which had been the subject of public debate for over 15 months before the offending articles were published. In paragraph 98 of the CC Judgement that view was articulated in the following form:

97. Considering the above findings regarding the legality of the arrest (see §§ 76-80) and taking into account that the only fact cited as the basis for the charges is the publication of the news reports in question, a strong measure such as an arrest that does not meet the legality requirements cannot be considered as a necessary and proportional intervention in a democratic society in terms of freedom of expression and press.

98. Furthermore, the characteristics of the incident in question and the reasoning provided by the arrest warrant do not make it clear which “urgent social need” necessitated such an intervention against the freedoms of expression and press as arresting the applicants and why it was necessary to do so in a democratic society in order to protect the national security without regard to the fact that a similar news report was published in another newspaper sixteen months ago and an investigation was launched against the news report in question six months before.

99. On the other hand, when evaluating the necessity and proportionality of an intervention in a democratic society, it is necessary to take into consideration the potential “chilling effect” of the interventions against the freedoms of expression and press upon the applicants and the press in general. (*Ergün Poyraz (2)*, § 79, for ECHR decisions in a similar vein, see *Nedim Şener/Turkey*, § 122; *Şık/Türkiye*, § 111). It is also clear that the fact that applicants were arrested without any concrete facts and reasoning regarding the necessity of an arrest apart from the news reports, might make a chilling effect on their freedoms of expression and press.”

It is clear that during the prosecution these words in the judgment were not taken into consideration.

## 5.) Conclusions and Recommendations

55. The shortcomings and defects in the indictment in this case which have been highlighted in this report reflect defects and shortcomings which have been present in many, many cases in Turkey over the last ten years. These defects and shortcomings have become exacerbated over the period since the attempted coup in July 2016 when numerous mass trials have taken place.

56. The level of apparent incompetence and lack of compliance with both domestic and international rules and principles governing the drafting of indictments on the part of the prosecutor in this and other cases is clearly astounding to lawyers who have trained and practiced in other European jurisdictions. No conviction based on the evidence adduced by this indictment can be regarded as safe or satisfactory.

57. The facts disclosed by the indictment do not appear to justify either the prosecution itself nor the conviction of the defendants for the offences with which they were charged.

58. The changes made to Article 170(4) of the Turkish Criminal Procedure Code in July 2021 instructing prosecutors not to include irrelevant materials in indictments do show some awareness that this practice is unacceptable. Let us hope that they will take heed of these changes in future cases.

59. First and foremost it is clear that the convictions of Mr Dündar and Mr Gül should be quashed. They are manifestly unsafe and unsatisfactory and resulted from a prosecution and trial which failed to comply with both domestic and international rules and obligations concerning the role of the prosecutor and the delivery of a fair trial to each of the defendants. The prosecutions were also clearly in breach of Turkey's obligations under Article 10 of ECHR.

60. Mr Dündar's second conviction in December 2020 was in breach of Turkey's international duties under Protocol 7 of the ECHR and is doubly open to challenge.

61. On 14<sup>th</sup> June 2021 the first International Fair Trial Day took place drawing together lawyers, bar associations and human rights organisations from across the world to focus on the increasingly challenged situation concerning fair trial rights in Turkey (and in other countries where the rule of law and fair trial rights are challenged). On the occasion of the International Fair Trial Day a joint statement was made by over 90 bar associations, associations of judges, NGO's and other human rights organisations calling on Turkey to implement a range of measures to address failings in the judicial system.<sup>xxiii</sup> These included calls to guarantee and respect the principle of presumption of innocence in all criminal investigations and prosecutions, and a demand to ensure that the rights to fair trial embodied in Article 6 of the ECHR and Article 14 of the ICCPR are respected in all criminal prosecutions in Turkey's criminal

courts at all levels. Turkey should take up this challenge and start the process of complying with these demands to move the country to a situation where the rule of law and fundamental rights and freedoms, including fair trial rights, are fully respected.

## About the author

Tony Fisher is CEO of the law firm Fisher Jones Greenwood LLP in Essex, England. Tony has undertaken a wide range of international and domestic human rights work and has appeared as an advocate in the European Court of Human Rights on many occasions. He is a Fellow of the Human Rights Centre at the University of Essex and is a member and former chair of the Human Rights Committee of the Law Society of England and Wales. He sits on the Council of the Law Society of England and Wales as the representative for the Essex constituency and on the International Committee, which oversees the international work of the Law Society.

## Endnotes

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<sup>i</sup><https://hudoc.echr.coe.int/eng#%7B%22fulltext%22:%5B%22Ahmet%20C5%9E%20and%20Nedim%20C5%9Eener%20v.%20Turkey%22%2C%22documentcollectionid%22:%5B%22GRANDCHAMBER%22%2C%22CHAMBER%22%2C%22itemid%22:%5B%22001-206411%22%5D%7D>

<sup>ii</sup> <https://globalfreedomofexpression.columbia.edu/cases/case-journalists-can-dundar-erdem-gul/>

<sup>iii</sup> Tattersall, Nick (2 May 2014). "Turkey dismisses corruption case that has dogged PM Erdoğan"

<sup>iv</sup> <https://www.reuters.com/article/us-mideast-crisis-turkey-arms-idUSKBN00E28T20150529>

<sup>v</sup> <https://www.bbc.co.uk/news/world-middle-east-22494128>

<sup>vi</sup> <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-58278%22%5D%7D>

<sup>vii</sup> <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-157399%22%5D%7D>

<sup>viii</sup><https://hudoc.echr.coe.int/eng#%7B%22fulltext%22:%5B%22%22CASE%20OF%20BARTHOLD%20v.%20GERMANY%22%22%2C%22documentcollectionid%22:%5B%22GRANDCHAMBER%22%2C%22CHAMBER%22%2C%22itemid%22:%5B%22001-57431%22%5D%7D>

<sup>ix</sup><https://hudoc.echr.coe.int/eng#%7B%22fulltext%22:%5B%22%22CASE%20OF%20LINGENS%20v.%20AUSTRIA%22%22%2C%22documentcollectionid%22:%5B%22GRANDCHAMBER%22%2C%22CHAMBER%22%2C%22itemid%22:%5B%22001-57523%22%5D%7D>

<sup>x</sup><https://hudoc.echr.coe.int/eng#%7B%22fulltext%22:%5B%22Stoll%20v.%20Switzerland%22%2C%22documentcollectionid%22:%5B%22GRANDCHAMBER%22%2C%22CHAMBER%22%2C%22itemid%22:%5B%22001-83870%22%5D%7D>

<sup>xi</sup> <http://hudoc.echr.coe.int/eng?i=001-160255>

<sup>xii</sup> <http://hudoc.echr.coe.int/eng?i=001-73200> (available only in French)

<sup>xiii</sup> <http://hudoc.echr.coe.int/eng?i=001-82846>

<sup>xiv</sup> <http://hudoc.echr.coe.int/eng?i=001-58080>

<sup>xv</sup> <http://hudoc.echr.coe.int/eng?i=001-171773>

<sup>xvi</sup> <http://hudoc.echr.coe.int/eng?i=001-103141> (available only in French and Turkish)

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- xvii <http://hudoc.echr.coe.int/eng?i=001-58115>
- xviii <http://hudoc.echr.coe.int/eng?i=001-58274>
- xix <http://hudoc.echr.coe.int/eng?i=001-65366> (available in French)
- xx <http://hudoc.echr.coe.int/eng?i=001-58858> (available in French)
- xxi <http://hudoc.echr.coe.int/eng?i=001-83413>
- xxii Ratified by Turkey in 2016, <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/country/TUR>
- xxiii <https://euromedrights.org/wp-content/uploads/2021/06/Joint-statement-on-International-Fair-Trial-Day.pdf>