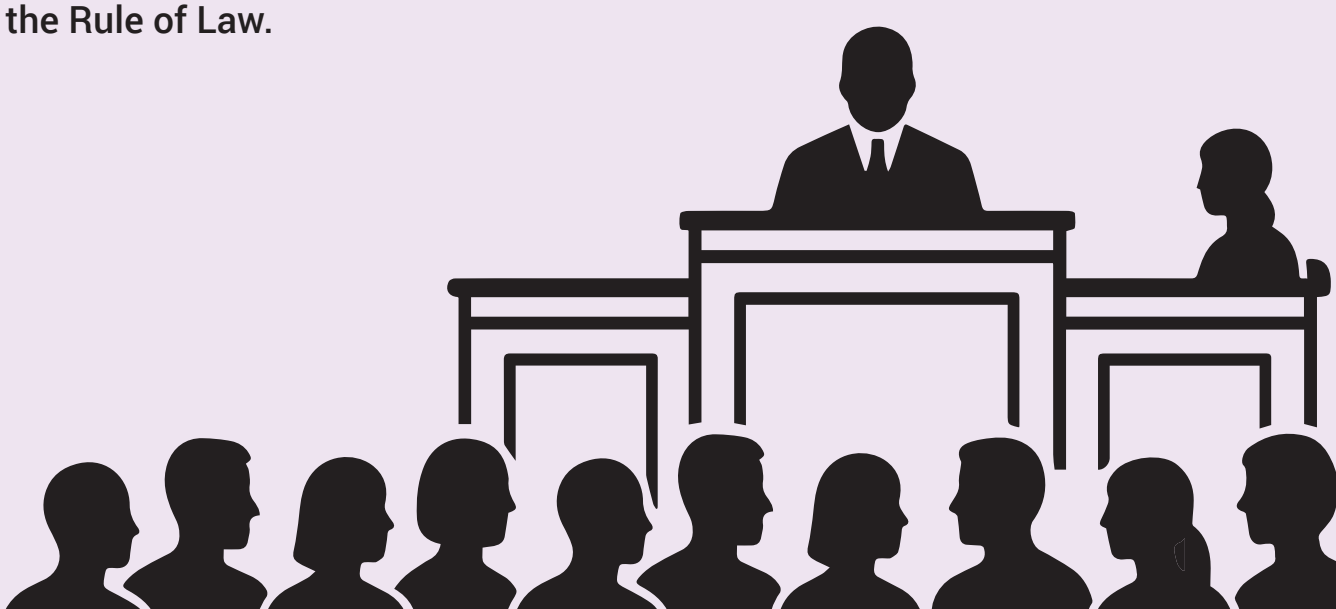
PEN NORWAY

Turkey Indictment Project

2025

The Study of 11 Indictments in Freedom of Expression Cases in Turkey, conducted between 2022 and 2024, with Articles and Interviews on the Crisis in Media Freedom and the Rule of Law.



This report is produced by PEN Norway.

Co-editors: Caroline Stockford & Şerife Ceren Uysal

About PEN Norway

PEN Norway is an independent membership organisation, dedicated to defending and promoting freedom of expression, and supporting writers, journalists and others using their freedom of expression that is at risk or in prison. PEN Norway's goal is that everyone should have the right to freedom of expression.

PEN Norway is a part of PEN International – the world's largest writer and freedom of expression organisation, established in 1921.

Contact information:

pen@norskpen.no

Sentralen, Øvre Slottsgate 3, 0157 Oslo, Norway

www.norskpen.no Facebook: /NorskPEN Instagram: /norskpen

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PEN NORWAY

Introduction

by Jørgen Watne Frydnes

For over three decades, PEN Norway has consistently championed the rights to freedom of expression and linguistic freedom, whilst steadfastly supporting writers, journalists, and civil society figures who face threats and imprisonment. PEN Norway's commitment arises from a deep-seated conviction in the fundamental necessity of safeguarding these freedoms, as they represent the cornerstone of a democratic society and serve as a barometer of justice and the rule of law.

PEN Norway's involvement in Turkey has a long history, however notably intensified following the attempted coup of 2016 and the subsequent period of emergency decrees. PEN Norway's response was to significantly enhance the trial monitoring activities, observing more than 200 hearings concerning freedom of expression cases against journalists, writers, and human rights defenders. It soon became clear through PEN Norway's observations that indictments—the foundational documents for criminal proceedings—often failed to meet basic standards of lawfulness. Consequently, in 2020, PEN Norway initiated the Turkey Indictment Project, aiming to systematically scrutinise these critical legal documents.

The Turkey Indictment Project has become one of the most significant and impactful initiatives of PEN Norway. Utilising a robust methodology, including renowned lawyers and academics from Norway, the UK, Austria, Germany, the Netherlands, Italy, and Turkey itself, the project evaluates indictments based on their conformity to Turkey's own Criminal Procedure Code, Article 170, as well as international human rights standards outlined in Article 6 of the European Convention on Human Rights (ECHR) and the UN Guidelines on the Role of Prosecutors.

In the first year alone, the 2020 report examined 12 prominent indictments and produced unsettling findings. The assessed indictments consistently lacked concrete evidence, contained

extraneous and prejudicial information, or demonstrated a disturbingly casual approach of copying and pasting content from unrelated police reports. This deeply flawed indictment process not only compromised defendants' fair trial rights but fundamentally undermined the judicial integrity of Turkey's legal system.

Building upon these revelations, the 2021 report shifted to highlight the diverse and interconnected judicial issues exacerbating freedom of expression violations. Our expert legal analyses targeted cases involving journalists, lawyers, academics, and documentary filmmakers, many specifically addressing the distinct experiences of Kurdish journalists, female media workers, and human rights advocates. We also explored new legislative measures restricting speech, illustrating vividly how laws have been instrumentalised to silence critical voices. The findings have proven pivotal, cited extensively in higher Turkish courts and influencing applications to both Turkey's Constitutional Court and the European Court of Human Rights.

This new edition, covering our comprehensive work from 2022 to 2024, continues and deepens our critical examination. Readers will find detailed evaluations of key indictments, expert legal analyses, and investigative articles that illuminate the pressing issues confronting freedom of expression in Turkey today. Thematically, the volume addresses ongoing trials against journalists, cases involving the systematic suppression of Kurdish journalists, and examines troubling new legislation intended to criminalise dissent and journalism. Further, it highlights legal attacks on civil society organisations and bar associations, reflecting broader threats to judicial independence.

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Importantly, the project's objective extends beyond mere documentation of judicial inadequacies. By identifying specific shortcomings and providing clear, actionable recommendations—such as the establishment of a standardised indictment template, ensuring the linkage of evidence to charges, and advocating comprehensive training programmes for prosecutors and judges—we seek to drive meaningful reform. The recent adoption of legislative amendments discouraging irrelevant evidence in indictments underscores our project's tangible impact.

The continued relevance and urgency of our mission are underscored by recent distressing developments. The detention of Istanbul's Mayor Ekrem İmamoğlu and ongoing litigation threatening the autonomy of the Istanbul Bar Association exemplify the precarious state of the rule of law in Turkey today. These events reaffirm the critical importance of our work, emphasizing the need for persistent international scrutiny and advocacy for judicial independence and fair trials.

As Director of PEN Norway, it fills me with profound pride to present this volume summarising our intensive efforts. This publication represents not only rigorous research and meticulous legal analysis but stands as a testament to PEN

Norway's unwavering support for human rights and judicial fairness. The voices highlighted in these pages urgently demand recognition and response, reflecting our deep commitment to illuminating the truths about justice—or its troubling absence—in Turkey today.

Our profound gratitude extends to the dedicated international team of legal experts, contributors, and local partners who have made this ambitious initiative possible, as well as to our exceptional internal team, including our translators, designers, editors, and all staff members whose diligence and professionalism have been indispensable in bringing this work to fruition. PEN Norway hopes this project will continue to inspire robust judicial reform, reinforcing international standards of justice and bolstering the resilience of democratic institutions. Ultimately, our fervent wish is that this work will support the people of Turkey in reclaiming their right to freedom of expression, securing a future in which justice and human dignity prevail.

Jørgen Watne Frydnes
Director of PEN Norway

PEN NORWAY

Legal Report on Indictment: **Cengiz Çandar**

Barbara Spinelli

Veteran journalist and columnist Cengiz Çandar was prosecuted for making propaganda for a terrorist organisation over a social media post he made following the death of a young woman who died fighting against ISIS. He was sentenced to 7 months and 15 days in prison, which was later converted into a judicial fine of 4,500 Turkish Lira.

Legal Report on Indicment: Cengiz Çandar

Author: Barbara Spinelli

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 the journalist Osman Cengiz Çandar by the Istanbul Chief Public Prosecutor's Office on 26 February 2018, with investigation no. 2018/71818 and indictment no. 2020/12491 in light of Turkey's domestic laws and international human rights laws in order to ascertain whether the indictment complies with these standards.

The case against Osman Cengiz Çandar was based on his publication of a tweet commenting the death of Ayşe Deniz Karacagil.

The indictment consists of two pages and charges Osman Cengiz Çandar with violating Articles 215/1, 218/1 and 53/1-a of the Turkish Penal Code (TPC), namely praising criminal offence and offender with this tweet.

Thus, the core of the case is his exercise of freedom of expression.

Section 2 of the report includes a brief summary of the case background information. Section 3 presents the legal analysis of the indictment. Section 3.2 evaluates the indictment against Turkey's domestic law focusing on Article 170 of the Turkish Criminal Procedure Code (CPC) and on Article 215 of the Turkish Penal Code (TPC). Section 3.3 assesses the indictment in light of international standards, specifically Articles 6, and 10 of the European Convention on Human Rights (ECHR), the United Nations (UN) Guidelines on the Role of the Prosecutors. The report concludes, in section 4, with recommendations on what can be done to improve the quality of the indictment.

2. Summary of Case Background Information

Cengiz Çandar is a journalist, a senior columnist. and a Middle East expert from Turkey. Çandar began his career as journalist in 1976 for the newspaper Vatan after living in the Middle East and Europe due to his opposition to the regime in Turkey following the military intervention in 1971. Being an expert on the Middle East (Lebanon and Palestine) and the Balkans (Bosnia and Herzegovina), Çandar worked for the Turkish News Agency and for the leading Turkish newspapers Cumhuriyet, Hürriyet, Sabah, Referans and Güneş as a war correspondent. He also worked as a senior columnist for Radikal and a columnist of Al-Monitor. During his 40-year long career of journalism, he was considered as one of the leading Middle East experts in Turkey. He was also a Special Advisor to President of Turkey, Turgut Özal on Foreign Policy between 1991 and 1993. He is author of seven books and several chapters of other books and he also has contributed to American periodicals like Journal of Democracy, Wilson Quarterly and Journal of Palestine Studies.

On the 30 May 2017 Çandar posted from his personal twitter account the following tweet :

> *The girl in the red scarf, the most beautiful smiling angel that warmed our hearts, fell to the ground, rose to the stars in front of Raqqa, and blazed in our hearts once again.*

The twitter was referred to the death of Ayşe Deniz Karacagil, who had been jailed in Turkey after her detention during Gezi protests for wearing a red scarf which was made a basis for her being labelled a terrorist by authorities and judiciary of Turkey. A prison sentence of 103 years was sought for Karacagil, who was released on February 6, 2014. After her release, Ayşe Deniz Karacagil who then became known as *'the girl with the red scarf'*, was fighting in the ranks of the International Freedom Battalion in the battle against ISIS in Rojava. She was killed by ISIS in the morning of May 29, one day before the tweet posted by Çandar.

Three years later, on the 30 Jun. 2020, an indictment, a little over a page long, was written against Çandar. The indictment alleged that Çandar committed the offence of praising a criminal offence and offender with this tweet. It was seen that the date of the offence was written as 2019 in the indictment. However, the tweet was posted in 2017.

Apart from Çandar, there is another suspect named K. J. in the indictment who tweeted on the same subject.

The indictment was accepted by the Istanbul 30th High Criminal Court During the first hearing on the 19 January 2021, the court board accepted the request of the prosecutor and ruled that the statement of the journalist should be taken via rogatory letters, as Çandar was residing abroad during the investigation. After several hearings, at the 16 Jun. 2022 hearing, Çandar's lawyer requested that the completion of the rogatory proceedings be awaited. The court decided to wait for Çandar's statement to be taken by rogatory letter. On the 29 September 2022 hearing the court rejected the request for immediate acquittal and ruled that the documents as to the letters rogatory should be completed.

In November 2022, the court decided to separate Çandar's file from that of the other defendant. The other defendant K. J. was sentenced to 7 months and 15 days in December 2022. The trial against Çandar is still ongoing.

3. Analysis of the Indictment

3.1 Evaluation of the Indictment in Terms of Turkey's Domestic Law

The indictment consists of less than one page.

The Criminal Procedure Code of Turkey (CPC) Article 170 regulates the duty of the public prosecutor and the required contents of the indictment. In fact, Article 170 of the relevant law clearly defines the basic criteria to be expected from a criminal procedure in general and an indictment in particular. It is understood that the criteria sought in indictments are also in line with international law. In this respect, a qualified and meticulous application of the relevant article is highly favourable for the preparation of a good indictment.

However, at first glance, the indictment against Çandar does not fulfil the criteria of Article 170. Moreover, it is possible to determine that the indictment contains factual errors. Therefore, even without a detailed examination, one gets the impression that the indictment prosecutor has not fulfilled the requirements of the law.

The first page provides general information about the indictment, the complainant and the suspects. The wording of the indictment is concise and imprecise. It only states the name of the offence, without describing it. It only reports the year (2019) and the place of the offence, without stating the day, date and month, as well as the time, on which the offence was committed. As it is

possible to realise from reading the investigation report, the date given, 2019, is also wrong, because the tweet have been posted on 30.05.2017. The applicable articles as well as collected evidence is given in the indictment as it is expected in Article 170.

This general section is followed by less than one page of 6 paragraphs of text with the heading «The investigation report was examined" and concludes with the prosecutor's request to sentence the 2 suspects under the article written above that are applicable to the act .

As formally required by Article 170, the indictment is addressed to the 30th Istanbul High Criminal Court and is signed electronically by the Istanbul Public Prosecutor along with the date of issue: 30.06.2020. Because of its position at the end of the text body, this date is not immediately noticeable, even though it plays a crucial role in the timeline of the judicial proceedings and should therefore be clearly displayed. The date of the alleged crimes (30.05.2017) and the date of issue of the indictment (30.06.2020) lie more than 3 years apart. The indictment is only based on the report dated 26.02.2018 by the Department of Security of the Security Forces, the survey by the Department of Combating Cybercrime, and the suspect K's statement, so, the question arose why the investigation phase and drafting of the indictment extended over a period of more than 3 years. According to Art 160 CPC, public prosecutors should immediately start an investigation as soon as they are informed of circumstances that give sufficient reason to assume that a crime has been committed. The indictment's investigation number 2018/71818 suggests that the prosecutor started the proceedings already in 2018 (based on the report dated 26.02.2018 by the Department of Security of the Security Forces). Moreover, as soon as prosecutors are notified of a possible crime, it is their duty to "investigate the factual truth, in order to make a decision on whether to file public charges or not". They have to collect all necessary evidence in relation to the events and have to decide whether there is sufficient suspicion to indict.

> Turkey leads the Council of Europe member states in the number of hostile judgements from the Court in freedom of expression cases under Article 10 ECHR.

An extremely diligent method of conducting the investigation might explain the delay in issuing the indictment, but this should have subsequently led to an equally diligent drafting. We cannot know for sure why the prosecutor took so long to draft the indictment, however, the structure and incomplete format of the indictment suggest that the document was put together in a rather sketchy manner.

A simple syllogism is used in the indictment: A. D. Karacagil is a terrorist, she was praised on social media by Çandar, therefore Çandar is guilty.

However, Çandar in his tweet merely recites words of remembrance for the 'girl in the red scarf', who, regardless of the fact that she was considered a terrorist by the authorities without a decision from judiciary, was nonetheless one of the protagonists of Turkey's recent history.

One of the conditions under Article 215 of TPC for the conduct of 'praising a criminal offence and offender' to be punishable is that any explicit and imminent danger to the public order occurs therefore. In this respect, the reason given in the indictment, that this condition must be deemed to exist in this case because Turkey is still under the threat of terrorism, appears to be wholly insufficient and extremely general, given that the words of Çandar's tweet does not contain any praise of A. D. Karacagil's actions, nor any direct or indirect incitement to any action aimed at endangering public order. It should also be mentioned that from the day the tweet was published in 2017, until the day the indictment was formulated in 2020, no violent action occurred as a result of the words contained in the tweet by Çandar or the other suspect. Since the prosecutor did not explain how Çandar's condolence tweet violated the cited articles of the law, it is up to the reader to interpret whether Çandar's tweet was in praise or not. At the risk of repetition, it should be emphasised that Çandar's social media post was merely an expression of sorrow over the death of a young woman. It is worrying that the expression of sincere sorrow in the face of death, without praise for violence or a violent act, is defined as a criminal offence. As worrying as it is, it is also worth noting that it brings Antigone to mind.

The condition that the act of praising should constitute a clear and close threat in terms of public order has been added to the article text which was amended by the Law on Amendment of Some Laws in the Context of Human Rights and Freedom of Expression no. 6459. In this way, it was aimed to establish a structure in harmony with precedents of the European Court of Human Rights.[1] Considering that this amendment to the law was made to protect freedom of expression, the prosecutor's disregard of the legislature's intentions is also thought-provoking.

The Turkey's Constitution acknowledges the right to freedom of thought and opinion. Article 25 reads as follows:

> *Everyone has the freedom of thought and opinion. No one shall be compelled to reveal his/her thoughts and opinions for any reason or purpose, nor shall anyone be blamed or accused because of his/her thoughts and opinions.*

At the same time, The Turkey's Constitution acknowledges the right to freedom of expression. In fact, Article 26 provides that:

> *Everyone has the right to express and disseminate his/her thoughts and opinions by speech, in writing or in pictures or through other media. This freedom includes the liberty of receiving or imparting information or ideas without interference by official authorities.*

However, this same article provides for a system of licensing and, finally, for the possibility to restrict such freedoms on grounds of national security, public order, public security or integrity of the nation.

Despite the constitutional protection of the right to freedom of expression and and the right to freedom of thought and opinion, and despite the legislative reform of TPC. Article 215, numeorus lawsuits have been filed in Turkey against many people with the claim that they praise crime due to their statements in social media and many penalties have been imposed in recent years. Which statement falls into the scope of freedom of expression and which one is praising an offence and/or offender is the most commonly debated issue in many criminal investigations.[2] There are also criticisms that almost all people tried for these crimes are dissenting writers, journalists, academics and human rights activists, as Çandar is.

Çandar's lawyer Erselan Aktan stated that the court should evaluate the social media post in question together with the fact that Çandar is a journalist and an investigative author and therefore his post should be considered within the confines of freedoms of expression and the press. Continuing his defence, lawyer Aktan stated:

> It is clear that the elements of the offense stipulated in the Article 215 did not occur. The court has the authority to immediately acquit Cengiz Çandar considering the judgments of the European Court of Human Rights and the Constitutional Court which dictate that courts should consider expressions together with their context and related facts.[3]

At this point, it is impossible not to agree with the statements of Çandar's lawyer that are quoted above. Because, as summarised before, there is an indictment that does not comply with Article 170 of the Criminal Procedure Code. But more than that, there is no criminal offence.

At this stage, summarising the findings may be useful to understand the gravity of the situation. Imagine an indictment; the date of the action in 2017 is written as 2019. Again, although the entire allegation is based on only one tweet, that is, there is actually no evidence to be collected, it took 3 years to write. The indictment defines Çandar's action (tweeting about a person the state considers a terrorist). It also defined the article of the law. But it did not feel the need to do the most important work it should have done according to Article 170 of the Criminal Procedure Code. How did the person's action (i.e. the tweet) violate the relevant article of law? The indictment does not answer this question. It is not possible to accept an indictment as an indictment that does not contain a cause-and-effect relationship and does not relate the elements of the article of law with the evidence. If such a practice becomes generalised, no individual in a society can be expected to speak freely under the legal protection.

In this short indictment written at the end of 3 years, the prosecutor, while explaining that Çandar should be punished, mentions only the fact that a person whom he claims to be a terrorist was brought up on social media. Then he says that Turkey is under terrorist threat. This is a very weak and unfortunately legally unacceptable reasoning. A prosecutor who makes such an allegation is expected to first refer to a finalised court decision stating that the person in question is a member of a terrorist organisation. It is not clear from the indictment whether there is such a judgement about the women who lost her life. In other words, it is not clear from the content of the indictment whether the prosecutor decided on his own that the young woman who lost her life was a terrorist or whether there is a finalised court decision against her. This is a major deficiency.

Assuming for a moment that this deficiency does not exist, for example if we assume that the person concerned is a person convicted of membership of a terrorist organisation, we expect the prosecutor to explain how Çandar praised this person with his words. And of course, he must also explain how the imminent danger, which is an element of the related crime, was created. The prosecutor does none of this. It is clear from the sloppy language of the indictment that the fact that Turkey is under terrorist threat is a sufficient threat for the prosecutor.

In conclusion, it should be noted that the indictment clearly violates Turkey's domestic law.

3.2 Evaluation of the Indictment in the Light of International Standards

According to Art 6/3-a ECHR and as well to Art. 14/3-a ICPCR, everyone has the minimum rights "to be informed promptly, in a language which he [or she] understands and in detail, of the nature and cause of the accusation against him [or her]". The underlying purpose of this article is to enable the defendants to prepare their defence accordingly and in good time before the first day of their trial. It should be a number one priority for a prosecutor to conduct the investigation as fast as possible and conclude the findings in a reasonable and well-argued indictment. The slow progress of the proceedings, the generic nature of the charge against Çandar are not in line with the international standards of a fair trial. The suspects and their lawyers have to put in extra effort to understand what is the accusation and to prepare their defence and start the trial already with a clear disadvantage.

The passage of 2 years between the starting of the investigation and the date on which the indictment was compiled consitute also a violation of Principle 12 of the United Nations Guidelines on the Role of Prosecutors.

In the second part of the indictment, is noted that "Therefore, it has been concluded that the suspects did commit the alleged crime". This statements clearly express a violation of the principle of the presumption of innocence, guaranted by Art. 6/2 ECHR as well as Art. 14/2 ICPCR. Moreover, consitute also a violation of Principle 13 of the United Nations Guidelines on the Role of Prosecutors, which stated that a prosecutor should always be impartial and objective, taking into account a defendant's position and interest.

It has been noted by several international associations that the application of TPC Article 215 frequently exceeds the permissible restrictions on the freedom of expression set out in international standards.[4]

Turkey leads the Council of Europe member states in the number of hostile judgements from the Court in freedom of expression cases under Article 10 ECHR.[5]

The previous chapter highlighted how in Çandar case a simple syllogism is used in the indictment, and the only reason reported in the indictment why Mr. Çandar's tweet is considered to lead to and an explicit and imminent danger to the public order is because Turkey is still under the threat of terrorism. In a very similar case[6], the ECtHR stated that

> *The fact of basing a conviction on circular reasoning, as the court in question had done in the instant case, amounted to an excessively broad interpretation of the law and a circumvention by the court in question of the obstacle set up by the legislature to ambiguous accusations punishing the expression of peaceful opinions in a public debate. The Court took the view that such a broad interpretation of Article 215 of the Penal Code had been unforeseeable for the applicant at the material time.*
>
> *Consequently, the interference in the applicant's exercise of his right to freedom of expression had failed to meet the "quality of the law" requirement under Article 10 of the Convention.*

> "It is not possible to accept an indictment as an indictment that does not contain a cause-and-effect relationship and does not relate the elements of the article of law with the evidence. If such a practice becomes generalised, no individual in a society can be expected to speak freely under the legal protection."

The Court pointed out that an interpretation of criminal law leading to confusion between, on the one hand, criticism levelled at the government in the framework of public debates, and on the other, pretexts used by terrorist organisations to justify their acts of violence, was necessarily incompatible with both Turkey's domestic law, which recognised public freedoms, and the Convention provisions protecting individuals against arbitrary infringements of those Convention freedoms.

The Court further noted that TPC Article 215/1 laid down safeguards against excessively broad interpretations of the law to the detriment of persons charged with offences, in particular making the criminalisation of statements considered as praising crime or criminals subject to the condition that those comments gave rise to a clear and present danger to public order.

4 Conclusion and Recommendations

The indictment against Çandar is a document constructed to look like it fulfills the formal requirements set out in Turkey's law, and that there is sufficient suspicion of a crime committed. On a closer inspection, however, serious procedural violations of CPC Article 170 emerge, such as the omission of the day, month and

time of the offence and the necessary connection between the act and the elements of the crime.

It does not take much analysis to detect that the content of the tweet is not capable of causing an explicit and imminent danger to public order, and that the reasoning of the indictement concerning this requirement of punishability of the conduct is tautological, and therefore non-existent.

While potential for abuse of the TPC Art. 215 would be reduced by clear guidelines to prosecutors on the human rights compliant application of such an offence, legitimately prosecutable acts could be brought under other Articles of the Penal Code. Amnesty International therefore recommends that Article 215 of the TPC be repealed in its entirety.[7]

However, in my opinion, even in its current form, the issuance of an indictment against Çandar's tweet is a grave violation of freedom of expression. Considering the findings in the reports on the indictments analysed by PEN Norway in 2020 and 2021, it is clear that prosecutors should adopt an approach that puts human rights and freedoms at the core. This is constantly reiterated in international legislation and guidelines on the duties and obligations of prosecutors. In order to fulfil this need, it is seen that a rights and freedom orientated training is a must in addition to a training in the field of criminal procedural law.

In conclusion, as has been elaborated in detail above, the present indictment violates a number of international and domestic standards and leaves us with serious concern for the guarantees of fairness and transparency of judicial proceedings in Turkey.

Endnotes

1 Devrim Aydın, "Praising Crime and Propoganda of Terrorism in Turkish Law", Journal of Law and Judicial System, 2(4), 2019, p. 1

2 Devrim Aydın, "Praising Crime and Propoganda of Terrorism in Turkish Law", Journal of Law and Judicial System, 2(4), 2019, p. 1.

3 https://www.mlsaturkey.com/en/the-court-rejected-the-request-of-cengiz-candars-lawyer-for-immediate-acquittal/

4 Turkey: Decriminalize dissent; Time to deliver on the right to freedom of expression. 27 March 2013 | Publisher: Amnesty International, p.13.

5 https://www.echr.coe.int/Documents/Stats_violation_1959_2021_ENG.pdf

6 Yasin Özdemir v. Turkey (ECHR application no. 14606/18).

7 Turkey: Decriminalize dissent; Time to deliver on the right to freedom of expression. 27 March 2013 | Publisher: Amnesty International, p.14.

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Legal Report on Indictment: **Sedef Kabaş**

Ezio Menzione

Sedef Kabaş is a journalist and TV host who has worked for several TV channels in Turkey since 1997. In 2019, she was tried for insulting the President following statements made during a TV broadcast and was sentenced to 11 months and 20 days in prison, with the sentence suspended.

Legal Report on Indictment: Sedef Kabaş

Author: Ezio Menzione

1. Introduction

This evaluation report is drafted as a part of the Turkey Indictment Project, established by PEN Norway. It represents an analysis of the indictment against Sedef Kabaş.

2. Summary of Case Background Information

Sedef Kabaş is a journalist and TV host, who has worked for several TV channels in Turkey since 1997. Born in London in 1968, she studied in Turkey and then in the USA: here she graduated in broadcast journalism, and then specialised in the same subject back in Turkey. She started her career as a television journalist in 1992 working also for CNN as correspondent for the Middle East and for the Balkan wars. Kabaş then returned to Turkey in 1997 where she began a career working for different broadcasters, including by hosting a renowned program (*Portreler*, portraits) interviewing well-known personalities from Turkey, which earned her the Diyalog Award for best anchor-woman in 1999. She has taught journalism in various universities of Turkey and has published six books, in addition to having hosted cultural programmes.

In 2015 Kabaş was tried for some articles and posts regarding the 2013 corruption scandal in Turkey, but was acquitted of all charges.

In 2019 she was again tried for insulting the President following some declarations made during a TV broadcast, and was sentenced to 11 months 20 days in prison, with suspended sentence.

On 14th January 2022, during a Tele 1 broadcast, Kabaş made some critical comments about Erdoğan and some Ministers of his government and, within the context of a very complex discourse, she quoted a popular proverb that goes "*when cattle enter a palace, they do not become king but rather, the palace becomes a stable".*

Criticism began to pour in immediately, including from the Minister of Justice, and she was accused of having "crossed the line" and having "incited hatred", receiving a warning that she "would be held accountable for this in court".

A few days later, again within the context of a more articulated discourse, on her social media account Kabaş clarified that the quoted sentence was an ancient Circassian proverb that sounded like "*when an ox enters a palace, it does not become king but rather, the palace becomes a stable*", and that she had replaced the word "ox" with "cattle" out of consideration and kindness.

At 2 a.m. on 22nd January, police raided Kabaş's residence and took her away to be interrogated. She was arrested on charges of having insulted the President and then brought to Bakırköy prison.

On 11th February the charge against her was formulated, namely violation of Art. 299 of the Turkish Penal Code (insulting the President), and 3 days later the Court accepted the indictment. The trial was held on 11th March 2022 and Kabaş was sentenced to 2 years and 4 months in prison, although she was later released following 49 days in prison.

The defence appeal before the İstanbul Regional Court of Appeal is still pending.

3. Analysis of the Indictment

3.1 Insulting the President

3.1.1 Regulation on Insult of the President in Turkey

The indictment brought against Kabaş relates to the crimes of "insulting the President" (Art. 299 TPC) and "insulting a public officer in the performance of his/her public duty" (Art. 125/3-a) TPC).

Art. 299 of the Turkish Penal Code reads as follows:

> *(1) Any person who insults the President of the Republic shall be sentenced to a penalty of imprisonment for a term of one to four years.*
>
> *(2) (Amended on 29.06.2005 by article 35 of the Law no.5377) Where the offence is committed in public, the sentence to be imposed shall be increased by one sixth.*
>
> *(3) The initiation of a prosecution for such offence shall be subject to the permission of the Minister of Justice.*

The case provided for in the first article (299 – insulting the President) is punished with imprisonment from 1 to 4 years, increasing by one sixth when the person is offended in public. The prosecution is initiated *ex officio*, although an authorisation from the Minister for Justice is required.

For cases covered in the second article (125 – insulting a public officer), the sentence ranges between 3 months and 2 years, and this cannot be less than 1 year when the person in question is a public officer defamed by reason of his/her office.

Here we will focus on the crime of "insulting the President" (Art. 299) and only marginally on the crime of "insulting a public officer" (Art. 125). The 1961 Turkish Penal Code provided for both crimes - however, the first type of offence moved from Art. 158 to Art. 299 (offence against the symbols of State sovereignty and the reputation of its bodies), whereas the second one was amended by Art. 15 of law No. 5377 of 29/06/2005.

Part 3 of the Turkish Penal Code, which encompasses Art. 299, also contains the much-discussed Art. 301 (as amended by Art. 1 of law No. 5759 of 30.04.2008), punishing the degrading of the Turkish nation, as well as the State of the Turkish Republic and the State's bodies and institutions. One could notice that, from a substantial standpoint, this article expressly provides that the expression of an opinion for the purpose of criticism does not constitute an offence, whereas Art. 299 makes no such exception. From a procedural standpoint, while under Art. 299 the authorisation of the Ministry of Justice is required to initiate the prosecution, Art. 125 provides that such authorisation is necessary even to simply start the investigation.

One may be tempted to smile when analysing some actual cases of insults to the President:

- Some journalists were convicted under Article 299 for having criticised the Government's actions in relation to matters of the utmost importance, such as the 2013 corruption scandal, the supply of arms to Syria, or the reception of Syrian refugees. All issues on which the

political debate was right to develop, including in heated tones, as they are vital for the country.

- One journalist (Birgün) was convicted for having called Erdoğan a "thief and murderer", adding that "we'd rather be among the 35 million you hate and consider enemies".
- The opposition leader was prosecuted for calling Erdoğan a "shameful dictator";
- Cartoonists from the periodical "*Penguen*" were convicted for some comic strips on Erdoğan's rise to power.
- Years later, an opposition politician took up those same strips in a social media post, and was convicted as well.
- A member of the opposition was convicted for having said that Erdoğan is "an enemy of Kurds and women".
- Even those who had criticised Erdoğan because of the gold-plated faucets he had had installed in the bathrooms of his presidential palace have been convicted.
- Art. 299 should be used in case of insults not just against the President, but also against his wife Emine Erdoğan, whose connections with a contracting company for a large state contract were exposed by a journalist, Gökay Başcan.

We could go on, of course, but it is not easy to find information about the thousands of cases for which complaints are filed every year, criminal cases are opened, trials are held and sentences are passed on the basis of Art. 299, which is used as a cudgel against political opponents (whether journalists, opposition politicians or ordinary citizens who dare to criticise the head of government, who is also the President of the Republic).[1]

3.1.2 The Crime of Insult of the President in Other European Systems

Almost all European criminal systems provide for sanctions against anyone who offends the President of the Republic or in any case the Head of State. The crime of *lese majesty* was already contemplated in Roman times, when it was heavily punished.

However, the question arises whether these types of offences can still exist in the face of the provision for freedom of expression, enshrined in the constitutions of several countries.

Let's take, for example, the case of Italy, where Art. 278 of the Italian Criminal Code expressly provides for the crime of *vilipendio* (insults) to the President of the Republic, with a punishment ranging from 1 to 5 years, therefore an even heavier one compared to that of Art. 299 TPC: the Italian Article requires that the offence be directed "to the honour or consideration" of the President, therefore both to his/her professional profile and to the office held. However, the articles sanctioning any offence to the honour of the Head of Government or attacks to his/her freedom have long since disappeared (namely since September 1944, right after the fall of the Fascist government). It's clear how, looking at case law and including at constitutional case law (as is the case with crimes of opinion, the Article was brought before the Constitutional Court several times), in order for there to be criminal liability the facts reported must not correspond to the truth; furthermore, the criticism must be voiced with words that are not excessive and, most of all, its target must be the highest office of the State, thereby harming the integrity of the State itself.

However, what is striking is how in Italy the offence of insulting the President is rarely invoked and very rarely applied, only in the face of insults involving the consideration of the Institution. Two examples:

- the President having moral responsibility in the death of Hon. Aldo Moro, killed by the *Brigate Rosse* organisation, "sending mafia messages", "doing nothing while holding office";

- the President (before becoming one) being promoted as a judge because "he was asked to simply convict poor people without fuss" and not having been "a real Catholic but rather, a reactionary, a bigot from that Pharisaic tradition of the whitewashed sepulchres, those Pharisees whom Jesus branded a 'kind of viper'".

No one has ever been charged with insulting the King in Spain, despite the offence being provided for in the Spanish Criminal Code. There have been some individual cases very recently, with the immediate mobilisation of the entire Spanish intelligentsia because some artists were involved. Rapper Valtony (from Mallorca) was charged with the offence and sentenced to 3 years and 6 months because of a song that was deemed offensive towards the monarchy. To avoid serving the sentence, the singer took refuge in Belgium: when faced with a request for extradition by Spain, the Belgian judiciary denied such request with a decision underlining how the singer's words fall under freedom of expression. Another rapper, Pablo Hasél (from Catalonia), was charged with insulting the King and sentenced to 2 years and 1 day (later reduced to 9 months) and, without parole, was then arrested. In the face of these cases, public opinion has asked for the crime of insults to the King to be eliminated.

In other European systems, *e.g.* in Hungary or Czech Republic, there is no offence relating to insulting the President; France only provides for a fine; the last case recorded in the Netherlands dates back to the 1960s, and we find a similar situation in Belgium, Greece, Portugal, Romania.

3.1.3 The Numbers of Indictments, Trials and Convictions for Insulting the President in Turkey

If these are the criteria by which Prosecutors' offices operate in Italy or in other European countries, those guiding the actions of the prosecutors seem to be completely different in Turkey. Let us analyse figures from 2014 onward - that is, since Erdoğan became President and cumulated the powers of the Head of Government).

Things were clear right from the start: between 2007 and 2014, during the seven-year term of President Gül, 1,359 investigations were opened, but only 545 were prosecuted and no one was arrested. In the first seven months of Erdoğan's presidency alone (August 2014 - March 2015) 236 people were investigated, with 105 prosecuted and 8 arrested. Furthermore, the number of cases submitted to the Minister of Justice for the issuing of the relevant authorisation rose from 397 in 2014 to 962 in the first six months of 2015. In the first six months of 2015 the Minister for Justice granted the authorisation in relation to 486 cases, whereas only 107 were granted in all of 2014.[2]

It's been an avalanche since then: 132 trials for insulting the President were initiated in 2014; 7,216 in 2015; 38,254 in 2016; 20,539 in 2017; 26,115 in 2018; 36,066 in 2019: over the course of 6 years, a total of 160,000 investigations were initiated for this offence. Of these, 35,507 cases (involving 38,608 people,

> "In the case of Kabaş, the Prosecutor failed to take into account domestic (Constitutional Court) and international (ECtHR) case law, as well as the recommendations of the Council of Europe and the opinion of the Venice Commission, thereby violating Art. 170 CPC: where favourable to the suspect, case law and (authoritative) opinions cannot but be taken into account in the indictment."

including 1,107 minors) were brought to trial, with 12,881 ending up with a conviction (involving 3,625 people) and 5,660 with an acquittal. Astronomical figures, clearly.[3]

3.1.4 The Presidential System and the Political Use of the Crime

We must ask ourselves, then, why numbers have soared from 2014 onward (with no drop in the two-year period of the pandemic).

There are two main reasons for this:

- In 2017 a presidentialist constitutional reform was passed, whereby the same person became President of the Republic, President of the relative majority party and Head of Government: anyone who does not identify with the governing party and criticises the majority's political line runs the risk of being investigated for having insulted the President, given that the offices coincide. The accumulation of power into one and the same person is enormous and therefore attracts lots of criticism whereas before, in a parliamentary Republic, the President of the Republic had very limited powers and basically represented the whole Nation, the whole State: therefore, it was perhaps more appropriate for the State to be protected through its figure.

- The crime of "insulting the President" is clearly used by the Head of State/Head of Government/Leader of the majority party to silence the opposition and any criticism in two typical ways: by silencing with trials and imprisonment of those who raise criticism, and by intimidating those who would like to raise criticism but dare not for fear of the consequences.

The facts of 14th December 2022 show clearly how crimes such as the ones envisaged in Art. 299 TPC and in its "parallel" Art. 125 TPC (insulting a public official) lend themselves to a political use by those in Government: the then-mayor of İstanbul, Ekrem İmamoğlu, was sentenced to 2 years and 7 months, with the accessory penalty of being banned from holding public office, for having insulted the Supreme Election Council by calling those who had cancelled the March 2019 Istanbul local elections "foolish" only to have the elections rerun three months later. It should be noted that İmamoğlu himself had been called "foolish" by the Minister of the Interior in relation to the same facts. But most of all, the particular timeliness of the verdict should be noted: should it be upheld on appeal, and therefore be made enforceable, it would eliminate İmamoğlu from the presidential election candidature in June 2023, for which he was credited as Erdoğan's most dangerous opponent: the timing of the verdict gives rise to many doubts. Furthermore, the judge delivering the verdict had been changed shortly before the trial, and the sentence imposed using the various aggravating circumstances provided for in Art. 125 TPC deviated from the one usually imposed (ca. 11 months) so as to avoid it being suspended under the law.

3.2 The Form of the Indictment

The indictment is well written. It is short and, therefore, easy to understand.

The examination of the investigation report shows not only the incriminated sentences, but also large excerpts of the speech given by Kabaş in the TV broadcast and some of her posts, thus allowing us to understand the context within which the incriminated sentences were pronounced.

The indictment acknowledges that a balance must always be achieved between freedom of expression, the need to provide news (the right-duty of information for journalists), freedom of the press and the good protected by Art. 299 TPC.

The examination of these often-conflicting interests is conducted in the light of European jurisprudence first and of domestic jurisprudence then - including (very briefly) constitutional jurisprudence, with reference to Articles 25 and 26 of Turkey's Constitution. The analysis also takes into account the world of social media.

The indictment seems above criticism. But are we sure it complies with all criteria set forth in Art. 170 CPC and fulfils all the obligations contained therein?

3.3 The Indictment and the International Law (ECHR)

The Public Prosecutor who drafted the indictment in February 2022 could not have been unaware of the fact that a few months before, namely in October 2021, a European sentence had been published by the ECtHR regarding the *Vedat Şorli v. Turkey* case:[4] precisely a case similar to that of Kabaş In the case brought before the European Court in 2017, Şorli had been sentenced to 11 months and 20 days (sentence suspended for 5 years) for having insulted the President because of 2 posts exchanged on Facebook - one in 2014 with a cartoon, and the other in 2016: both posts had a clear satirical meaning. The Regional Court of Appeal had rejected his appeal and the Constitutional Court, to which Şorli had resorted, had rejected his appeal in 2019 on grounds that it was manifestly unfounded. For the offence, Şorli had been detained pending trial for 2 months and 2 days.

The European Court's decision was unanimous and, therefore, it must have been shared also by the judge from Turkey, Saadet Yüksel.

The judgment states that:

1. Art. 299 TPC violates Art. 10 of the European Convention on Human Rights;

2. just like any other person, the President of the Republic enjoys the protection granted to anyone by the crime of defamation (Art. 125 TPC);

3. there is no reason to grant the President a higher degree of protection, one which would also entail a prison sentence;

4. the preventive custody and the prison sentence, albeit suspended, had had a "chilling" effect on the freedom of expression of the convicted person;

5. in any case, criminal procedures involving the right to freedom of expression must be resorted to with restraint, and this was not the case in Turkey.

The Court also noted how there was indeed a precedent dating back to 2007, which went in the same direction, therefore somehow anticipating the judgment made:[5] Turkey should have taken this into account and adjust accordingly.

There is no trace of this in the indictment drafted by the Prosecutor, although he boasts about having taken into consideration the dictates of the European Court.

Let us add an annotation: not only does the very broad, illegitimate and unscrupulous use of the offence of insulting the President have a chilling effect on all information tools, on journalists, on opinion makers and more generally on citizens, who may be expressing their opinions on social media; it is first and foremost an actual gag put for 5 years on those sentenced to imprisonment with such sentence suspended for that period. It is an effective signal intended to be sent to the convicted person: do not dare to criticise the President's actions again, because not only will you be convicted, but you will also serve time for the statements for which you are being convicted today. We must add that the standard in case of violation of Art. 299 TPC is a sentence of less than a year with sentence suspended for 5 years: the same sentence imposed on Kabaş.

In essence, the European Court ruled that:

> *The State, Government or any other Institution of the executive, legislative or judiciary power may be criticised by media. These Institutions as such should not be protected by criminal laws against defamatory and offensive opinion because of their dominant position. Where, however, these Institutions are granted such protection, the latter should be used in a restrictive sense, avoiding under any circumstance its use to limit freedom of expression. Individuals representing these Institutions are mostly protected as individuals* (by norms on defamation - Ed.).

Political figures should not be granted a higher protection of their reputation compared to other individuals… Exceptions should be made only when strictly necessary to allow a public officer to properly perform his or her duties.

Defamation or insults in the media should not lead to imprisonment, unless the severity of the violation of rights or of the reputation of others make it a strictly necessary and proportionate punishment, especially when other rights have been seriously violated through defamation or insults in the media, as is the case of hate speech.

The Prosecutor does not regard nor cite this decision by the ECtHR, which was well known and commented on since its publication (5 months earlier), but he refers to no less than 8 other European verdicts (none of which concerning Turkey).

3.4 The European Parliament and the Venice Commission

The Court that will have to analyse the indictment and rule on it must be enabled to do so, not just by examining the facts but, indeed, especially by examining the legal issues. Remaining silent about the existence of national and international case law (to the highest degree) is like inventing an offence that does not exist or a circumstance of an offence that is not considered in the Code.

The ECtHR judgment we reported is also based on a European Parliament regulation calling for the abolition of prison sentences for the crime of insulting the President.

Above all, this verdict involves the opinion expressed by the Venice Commission, an advisory board of the Council of Europe, composed of independent experts in Constitutional Law: moving from the fact that Turkey (in addition to Azerbaijan) had failed to revise its domestic rules on defamation and insults, the Commission had thoroughly analysed Articles 216 (provoking hatred, hostility and degradation), 299 (insulting the President), 301 (insults against the Turkish Nation, the Turkish State or the Turkish Republic, or to State bodies and institutions) and 314 (armed conspiracy) of the Turkish Penal Code. All these offences, except the last one, can be labelled as "opinion crimes". In an opinion from 2016,[6] the Venice Commission found that all such norms did not comply with European standards as regards their current wording or practice.

In particular, for the crime of insulting the President, the Venice Commission had found that:

… with respect to Article 299 (insulting the President of the Republic), no progress has been made and its use has recently increased substantially. The Article fails to take into account the European consensus which indicates that States should either decriminalise defamation of the Head of State or limit this offence to the most serious form of verbal attacks against them, at the same time restricting the range of sanctions to those not involving imprisonment. Having regard to the excessive and growing use of this Article, the Commission considers that, in the Turkish context, the only solution to avoid further violations of the freedom of expression is to completely repeal this Article and to ensure that application of the general provision is consistent with these criteria.

It is true that the 2016 document of the Venice Commission is only an opinion, but it does indeed represent a trace for future ECtHR decisions (who in fact fully complied with it in 2021) and of the Council of the European Parliament.

Such opinions cannot be left out when, as is the case with this indictment, one wishes to make a comprehensive review of the doctrine as well, in addition to the jurisprudence, only to simply recall the greatest advocate of the regimen and of Italian fascist legislation, namely Vincenzo Manzini (p. 6 of the indictment) who, furthermore, was writing on the basis of fascists and authoritarian laws that are now largely outdated even in his own country.

It may be useful to underline a further passage of the opinion of the Venice Commission.[7] In relation to Art. 301 TPC (the discussion also covers Art. 299), the Commission notes how the authorisation of the Minister of Justice, required to proceed against those who have insulted the President, ends up being contrary to the independence of the judiciary and to the separation of powers, thus representing a real interference of the executive power in the judiciary one, with the risk for this authorisation to be the expression of political choices, or even of political retaliation, which allows for arbitrary prosecutions.

3.5 The Indictment and the Domestic Law: The Constitutional Court

The Prosecutor also failed to take into account three decisions made by the Turkey's Constitutional Court in September 2014[8] and that had preceded the drafting of the indictment against Kabaş.

In the *Diren Taşkıran* ruling, the Constitutional Court clearly explains how the judge must ponder the balance between freedom of expression and the possible insult to the Head of State, and does so by dictating several criteria to be taken into account:

> i. Whether the allegedly offending statement was a statement of facts, or a value judgement. [See the European Court of Human Rights (ECtHR) Guide on Article 10 of the European Convention on Human Rights (pp. 38-40) for an overview of the distinction drawn between statements of facts and value judgements in the freedom of expression jurisprudence of the ECtHR, from which the Constitutional Court draws its test.]
>
> ii. The identity of the person who has made the statement.
>
> iii. The identity of the target of the statement; the degree of notoriety of the target; and whether the limits of acceptable criticism that the target of the statements must tolerate is wider than that for ordinary citizens.
>
> iv. Whether the statement contributes to debates on matters of public concern, and the relative importance of the rights of the public and other persons that conflict with the statement.
>
> v. The value of the statement in informing the public, the existence of public interest, and whether the subject matter of the statement is current.
>
> vi. Whether the complainant had the opportunity to respond to the statement that was directed at him.
>
> vii. The effect of the statement on the targeted person.
>
> viii. Whether the risk of being sanctioned would create a chilling effect [in the enjoyment of the freedom of expression] for the petitioner who has the statement.

As trial judges did not analyse the above criteria in any of the three cases considered by the Court, the Constitutional Court annulled the three convictions, imposing to hold a new trial compliant with the criteria it had set forth.

Among the three, the *Şaban Sevinç* case is the most interesting one, because it takes into account **the issue of presidentialism,** although he rejected it. It was the first time the issue was addressed, and we must acknowledge that it is an absolutely essential one.

The appellant argued that Art. 299 TPC was established when the Head of State was a neutral figure in the political arena; however, following the constitutional reform of 2017, the President of the Republic coincides with the head of the executive and may also be (as is the case of President Erdoğan) the leader of the majority party. Therefore, the President of the Republic is no longer a third and neutral figure (at least in principle) compared to the political arena and no longer represents the totality of the nation but rather, a part of it - albeit the majority one.

The President will therefore be subject to criticism (and satire, we would add) just like any other politician, and limiting such forms of criticism means limiting the free expression of democracy.

As noted, the Constitutional Court rejected such considerations in the *Şaban Sevinç* ruling explaining how, although the President (as a public figure) should tolerate criticism more than ordinary citizens, the legislator had used its discretionary power in increasing the level of protection on grounds that an insult directed at the President - elected by a national popular vote - may be considered as directed at the symbolic significance of the Presidency, representing the unity of the Nation.[9]

Many objections may be raised against such a reasoning. First, the most obvious one: how does one decide which is **the point of differentiation** between an insult to the representative of the whole Nation (also assuming it is such, and it is not) and a simple insult to a partisan politician (and in the current set-up, the President of Turkey is such)? It should be noted that, since this is a case of application of a criminal rule, it needs to be clear and precise, in line with the criteria of legality presiding over the application of criminal law rules. When such concrete precision is lacking because it is not given to the judge to determine whether the indicted is guilty or not, it is precisely the rule itself that cannot be applied.

One cannot ignore that criminal cases of insulting the President have been soaring since 2016-2017 onward, that is, **since the 2017 presidentialist constitutional reform cumulated the office of President of the Republic and the office of Head of Government into the same person,** so that the application of Art. 299 TPC, which was reserved to cases of insults to the President, was applied to criticism and satire against the Head of Government, with an ambiguity and an unjustified blurring of the norm itself - which at this point, as the Venice Commission says, cannot be modified nor amended but rather, will simply have to be abolished.

In fact - argues the Venice Commission in its previously cited opinion[10] - under Art. 90/5 of the Turkey's Constitution, the ECHR is already an integral part of the Turkey's legal system, and both its courts and its prosecutors have a legal obligation to apply the Convention and the rulings directly from the ECtHR into domestic law.

Let us keep in mind paragraph 5 of Art. 170 CPC: when drafting the indictment, "*in the conclusion section of the indictment* [the Prosecutor] *shall include not only the issues that are disfavorable to the suspect, but also issues in his favour*".

In the case of Kabaş, **the Prosecutor failed to take into account domestic (Constitutional Court) and international (ECtHR) case law,** as well as the recommendations of the Council of Europe and the opinion of the Venice Commission, thereby violating Art. 170 CPC: where favourable to the suspect, case law and (authoritative) opinions cannot but be taken into account in the indictment. The Prosecutor who is able to and deems it useful, may try and challenge them, but they may not be purely and simply omitted.

The Court that will have to analyse the indictment and rule on it must be enabled to do so, not just by examining the facts but, indeed, especially by examining the legal issues. Remaining silent about the existence of national and international case law (to the highest degree) is like inventing an offence that does not exist or a circumstance of an offence that is not considered in the Code.

The Prosecutor has "**cheated**" also in point of fact:

- **The Prosecutor did not mention the number of cases of insults to the Presidents**, representing *per se* an alarming framework for the Kabaş case that cannot be ignored by the judge called upon to rule

  There is a clear difference between inserting the Kabaş case within the context of a few cases per year instead of thousands and thousand of cases. The assessment of the fact cannot but take into account an assessment of the pretextual and illegitimate existence of thousands of similar cases, prosecuted with the sole purpose of silencing political opposition in violation of Article 10 ECHR and Articles 25 and 26 of Turkey's Constitution;

- In reporting the *de facto* elements, the Prosecutor did not even note nor underline that reporting a popular proverb was an element not just of political criticism, but a more properly element of **satire**; and as is always the case with satire, it is not just **necessarily an expression of the opposition** but rather, it also feeds on "coarse" and vulgar elements,

  This is not the case with the position expressed by Kabaş which, aside from reporting the Circassian proverb, is entirely legitimate under the rules of correctness of language and of its "continence". But even if it went beyond the criteria of continence, within certain limits this would be justified and legitimized by the fact **this is a case of satire and not just criticism**.

It is good to read the indictment in full, right in the part where it reports Kabaş's speech extensively.

Her intent, in fact, is to criticise Erdoğan for the language he uses - a language that knows no half measures and that singles out political opponents as real **enemies**: Kabaş deploys a very complex and subtle argument.

It is paradoxical that the intention was to strike and then punish with a heavy prison sentence the overall cautious and measured language used by the journalist, who was criticising the President's language.

Kabaş's words have likely struck a chord with Erdoğan, who reacted by reporting her and has (easily) found a Prosecutor willing to ask to initiate the prosecution and has (even more easily) found a Minister of Justice willing to grant the authorisation for the prosecution.

4. Conclusion and Recommendations

Our conclusions are primarily addressed to the political authority of Turkey:

- in line with ECtHR case law , the political authority should intervene and: a) at the very least amend Art. 299 by providing **only for a fine and only for very serious hypotheses** of insults to the President; b) identify certain and clear hypotheses of insults to the President, quite distinct from cases where the insult is directed against the Head of Government or the leader of the majority party;

- in conforming to the opinions expressed by the Council of Europe and the Venice Commission, it may even **repeal Art. 299** and refer the hypothesis contained therein to Art. 125 TPC (common defamation) without granting any higher protection to those holding public offices (and in particular to the President)

Some recommendations should also be proposed to the Prosecutor:

- given the dubious legitimacy of Art. 299 under both domestic law (the Constitution) and international law (ECHR), the representative for the prosecution will invoke Art. 299 **with the**

utmost restraint, keeping in mind how this is clearly conflicting with freedom of expression;

- such restraint is all the more incumbent when dealing with declarations made to exercise the right to **political satire** which, by its very nature, is the expression of a moment of opposition to the ruling power and resorts to coarser, albeit perhaps more subtle, forms than simple political criticism;

- in citing recent cases, **it is not licit to avoid recalling the cases contrary to one's thesis**, especially when these are more pointed and recent: this is outright cheating and, in any case, **it is prohibited by Art. 170 CPC**.

Endnotes

1 These cases are expressly referred to by Venice Commission, Opinion No. 831/2015, published on 15th March 2016;

2 Ministry of Justice, General Directorate of Criminal Affairs, 17th May 2015.

3 Human Rights Watch Turkey, based on Ministry of Justice, General Directorate of Criminal Affairs. The Presidency of the Republic has contested the data provided by the Ministry of Justice, but these have been confirmed by the Ministry itself and by the most authoritative observers.

4 Vedat Şorli v. Turkey, application No. 42048/19, ECHR 313 (2021) dated 19th October 2021

5 Artun and Günever v. Turkey, (No. 755510/01, /31, 26th June 2007)

6 Venice Commission, Opinion No. 831/2015 published on 15th March 2016;

7 VC cit. / 91

8 The cases were: Diren Taşkıran, B. No.: 2017/26466, 26th May 2021; Şaban Sevinç (2), B. No.: 2016/36777, 26th May 2021; Yaşar Gökoğlu, B. No.: 2017/6162, 8th June 2021).

9 /33 Şaban Sevinç cit.

10 VC cit. / 93.

PEN NORWAY

Legal Report on Indictment: **Ekrem İmamoğlu**

Tony Fisher

Istanbul Metropolitan Mayor Ekrem İmamoğlu was prosecuted for allegedly insulting members of the Supreme Election Council who annulled the Istanbul elections, based on remarks he made in a speech criticizing the annulment. He was sentenced to 2 years and 7 months in prison. The verdict is currently before Istanbul Regional Court of Appeal.

Legal Report on Indictment: Ekrem İmamoğlu

Author: Tony Fisher

1. Introduction

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 defendant Ekrem İmamoğlu.

Ekrem İmamoğlu was born in 1970. He graduated from Istanbul University with a Bachelor's degree in Business Administration. Following his undergraduate studies, he completed a Master of Science degree in Human Resources Management in the same university.

Mr İmamoğlu started working for the family business. He then assumed the CEO role in the group's companies to lead housing and urban planning projects. According to his official biography, while leading these projects, he encountered numerous problems stemming from local affairs, which led him to his decision to enter politics.

Mr İmamoğlu joined the main opposition Republican People's Party (CHP) in 2009, and became a member of the Beylikdüzü District Organisation. In the same year he ran as a candidate for nomination to Beylikdüzü District Mayor and actively participated in the party's election campaign. Following the local election, he was elected the District Head of the CHP.

After 5 years as a District Head he was nominated in 2013 as a candidate for Beylikdüzü District Mayor in the preliminary election within his party. In the March 30 local elections in 2014, he was elected Mayor of Beylikdüzü.

Subsequently, the CHP nominated Mr. İmamoğlu for Mayor of Istanbul (İBB) in the local elections of March 31, 2019. He gained 48.82% of the total votes and was elected Mayor of Istanbul. This was the highest percentage of votes that any Mayor of Istanbul had received in over 30 years.

Nevertheless, following objections made by the ruling party, the Supreme Board of Elections (YSK) annulled Mr. İmamoğlu's mandate on his 18th day as Mayor, relying on a decision that went against its own legal precedents. The YSK ruled for an election re-run to be held on June 23, 2019.

On June 23, 2019, he achieved a more substantial victory than he had achieved on March 31, and was elected Mayor with the support of 54.2% of the voters.

2. Summary of Case Background Information

Ekrem İmamoğlu was elected as IBB Mayor with a majority of approximately 13,000 votes in the local elections held on 31 March 2019.

On 6 May 2019, the YSK announced that it annulled the election by 7 votes to 4. In its 250-page reasoned decision, including the dissenting opinions of 4 members of the Board, the Board defined "non-compliance with the requirement that the chairmen and members of the ballot box committees must be public officials" as "an event and situation affecting the election results" and justified the annullment of the election.

YSK President Sadi Güven and members Cengiz Topaktaş, Kürşat Hamurcu and Yunus Aykın all dissented from the views of the majority.

Mr İmamoğlu won the election re-run on 23 June 2019, this time with a majority of approximately 800,000 votes.

Ekrem İmamoğlu attended the Congress of Local and Regional Authorities of the Council of Europe held in Strasbourg, France on 30 October 2019 as IBB Mayor.

In his speech at the congress, Imamoğlu said that unlimited public resources were used in favour of the government during the election process, along with language that divided and polarised society. He also stated that the President and cabinet members displayed actions and practices that ignored the election rules, and the state news agency Anadolu Agency wanted to manipulate the election results. He added that the government wanted to win the election it lost on 31 March by having it annulled by a YSK decision.

Interior Minister Süleyman Soylu said on 4 November 2019, "I am telling the ***idiot*** *[ahmak – in original language*] who went to the European Parliament and complained about Turkey; this nation will make you pay for it. This job is not so free".

On the same day, Imamoğlu made a statement to journalists upon being reminded of Soylu's remarks and said, " Those who annulled the elections of March 31, considering the image they conveyed of us to Europe and what has happened since then, the ***idiots*** are those who annulled the elections of March 31..."

The Istanbul Anatolian Chief Public Prosecutor's Office initiated an investigation upon the notification made by the Presidency of the Supreme Board of Elections on 15 November 2019. After the investigation, a lawsuit was filed.

IBB Mayor Ekrem İmamoğlu attended the interim hearing in January in the case held at the Anatolian 7th Criminal Court of First Instance. He defended himself with the following words:

> *"First of all, the statement given here is a statement given on a question. The basis of the question is that the Minister of Interior used the word idiot' in his statements against me. My answer in question was based on this question. Therefore, it is a word used in response to this word idiot used against me and the addressee is the Minister of Interior. Therefore, I never made such a statement addressing the YSK or any of its members.*
>
> *All political actors, political identities representing the government and everyone made statements about the annulment of the election. What the YSK does or what decisions it makes is not the addressee of my statement. My will is defined by my own statement. I meant those who cancelled the elections, not the members of the YSK"*

In December 2022, he was sentenced to two years seven months fifteen days in prison on charges of insulting members of the Supreme Electoral Council.

2.1 Timeline of the Judicial Process

31 Mar 2019: Local election in İstanbul. İmamoğlu was elected as IBB Mayor with a difference of approximately 13,000 votes.

6 May 2019: YSK canceled the election.

> İmamoğlu was sentenced to two years seven months fifteen days in prison on charges of insulting members of the Supreme Electoral Council. The court also banned him from elected political office and other activities for the duration of the prison sentence he may serve if the conviction is upheld at appeal. The case is still pending before the Istanbul Regional Court of Appeal.

23 Jun 2019: Election was repeated and İmamoğlu was elected again with a difference of approximately 800,000 votes.

30 Oct 2019: He attended the Congress of Local and Regional Authorities of the Council of Europe held in Strasbourg, France and criticized the government.

4 Nov 2019: Minister of Interior Süleyman Soylu made a statement and called İmamoğlu an ***idiot***.

4 Nov 2019: İmamoğlu made a statement to journalists upon being reminded of Soylu's remarks and said, " Those who annulled the elections of March 31, considering the image they conveyed of us to Europe and what has happened since then, the **idiots** are those who annulled the elections of March 31..."

15 Nov 2019: The YSK made a complaint against İmamoğlu concerning his statement of November 4, 2019.

27 May 2021: The indictment was issued.

9 Nov 2021: The first hearing: İmamoğlu was not present due to his working schedule as the Mayor of İstanbul. His lawyers demanded that İmamoğlu's defence be taken when he is available to attend.

10 Jan 2022: İmamoğlu went to the courthouse and made his defence. The case was sent to the prosecutor to prepare his final opinion about the case.

1 Jun 2022: The second hearing: Before the hearing, Imamoğlu's lawyers requested the recusal of the judges. An additional report containing the expert opinion that Imamoğlu did not have any discourse against the members of the YSK was presented at the hearing. The defence team also asked the court to hear their witnesses. The court rejected the demand for recusal of the judges and instead made a ruling that the file should be sent to the prosecutor's office for examination of the report and adjourned the hearing.

21 Sep 2022: The third hearing: Before the hearing, the defence team submitted a DVD containing Süleyman Soylu's and İmamoğlu's speech and asked for it to be analysed. The court accepted the demand of the defence team and postponed the hearing.

11 Nov 2022: The court heard the witnesses. Then the court gave the prosecutor the floor to present his final opinion. Imamoğlu's lawyers objected stating that not all the evidence was collected and requested that the judges recuse themselves. The court ruled that the request was aimed at prolonging the trial and rejected it. In the final opinion on the case, the prosecutor asked for a sentence of imprisonment of up to 4 years and 1 month be imposed on İmamoğlu for "publicly insulting public officials working in a committee due to their duties".

14 Dec 2022: Final hearing: The court asked for the prosecutor's

opinion again because the witnesses were heard after he announced his opinion. The prosecutor repeated his former opinion. İmamoğlu was sentenced to two years seven months fifteen days in prison on charges of insulting members of the Supreme Electoral Council. The court also banned him from elected political office and other activities for the duration of the prison sentence he may serve if the conviction is upheld at appeal. The case is still pending before the Istanbul Regional Court of Appeal.

3. Analysis of the Indictment

3.1 Summary of the Indictment and General Overview

The indictment in this case is unusually brief, reciting the facts in the following terms:

> *"IT IS UNDERSTOOD THAT the suspect Ekrem İmamoğlu, who was the Istanbul Metropolitan Municipality Mayor as of the date of the crime which was Monday, November 4, 2019, during his statements to the members of the press in the Üsküdar Fethipaşa Park, stated that "Those who annulled the elections of March 31, considering the image they conveyed of us to Europe and what has happened since then, the idiots are those who annulled the elections of March 31..." and thus publicly insulted the members of the Supreme Election Council, because the word "idiot" contained in the statement means, according to the Dictionary of the Turkish Language Institution, "a person who is unable to use his/her intellect properly, imbecile, fool, dumb" (a copy of the related dictionary entry from www.sozluk.gov.tr is added to the file) and as such it was used in a manner that may impugn that person's honour, dignity or prestige, AND THAT, considering the Istanbul Metropolitan Municipality Mayoral Elections were annulled on May 6, 2019 by the Supreme Election Council, there is no doubt the phrase was aimed at the victims who were public officials working as a committee, AND THEREFORE THAT the suspect committed the alleged crime, AND THAT although it is noted that the suspect was fulfilling the role of Mayor of İstanbul on the date of the offense, it is necessary to interpret the action subject to the investigation as the suspect's personal offence, an opinion which was supported by the case-law of the higher courts, THAT the 4th Penal Chamber of the Court of Cassation, in its ruling with Merits No. 2008/19328 and Ruling No. 2008/20739, ruled on a case similar to this investigation that the act of another metropolitan municipality mayor who insulted a third party in a press release was not about the role he/she was fulfilling, that the provisions of the Law No. 4483 could not be enforced, and that the investigation had to be conducted in line with the general provisions without a need to obtain an investigation permit. Therefore, in line with the collected evidence and the scope of the file explained above, IT IS UNDERSTOOD THAT the suspect committed the alleged crime and that there is reasonable level of doubt to file a criminal case against the suspect."*

The indictment refers to the commission of a crime under Article 125 of the Turkish Penal Code. Article 125 (1) sets out the boundaries of the offence in the following terms:

> *"Any person who attributes an act, or fact, to a person in a manner that may impugn that person's honour, dignity or prestige, or attacks someone's honour, dignity or prestige by swearing shall be sentenced to a penalty of imprisonment for a term of three months to two years or a judicial fine. To be culpable for an insult made in the absence of the victim, the act should be committed in the presence of at least three further people."*

In addition to Article 125 (1) the indictment refers to the following articles in the Turkish Penal Code Article 125/2-1, Article 125/3-a,4,5, Article 43/2-1 and Article 53. The additional provisions of Article 125 are relevant to sentencing and make the commission of the offence against a member of a committee the commission of the offence against all members of the relevant committee. Article 43 was included to secure that the commission of a single offence would be regarded as the commission of a succession of offences (presumably against each member of the board) and Article 53 has been included since a conviction under Article 125 would preclude Mr İmamoğlu from serving as a "*a member of the Turkish Grand National Assembly or undertaking employment as,*

or in the service of, an appointed or elected public officer permanently, temporarily or for a fixed period of time within the administration of the state, a province, municipality or village, or institution or entity under their control or supervision." There are other prohibitions under Article 53, but these are the most relevant in Mr İmamoğlu's case and it should be noted that these prohibitions only apply to immediate custodial sentences and not to suspended sentences.

The indictment is short and the only evidence which appears to have been secured by the prosecutor is a recording of the exchange of comments mentioned above and a statement provided by Mr İmamoğlu himself in which he denies that the statement was addressed to the members of the Election Board but was intended only to be addressed to the minister who had called him an "idiot" in the first instance.

3.2 The Relevant Domestic Law

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 "Presidency of the Supreme Election Council". 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, or even that his denial that the comment was addressed to the members of the Election Council was the only witness evidence that was available. It is understood that during the course of the trial the court also heard testimony from Mr İmamoğlu 's press officer, Murat Ongun, and another aide who confirmed that his words were in response to the comments made by Mr Soylu.

Paragraph 2 of Article 170 of CPC 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. TPC Article 125 requires that there is evidence that the defendant "*attacks someone's honour, dignity or prestige by swearing".* Even if the prosecutor did not feel that he could accept the Defendant's statement that the phrase used was not addressed to the members of the Election Council, (and if the court subsequently did not accept the testimony of Mr Ongun and the other aide who gave evidence) there should have been some analysis at an early stage as to whether the use of the term "idiot" constituted "swearing" for the purposes of TPC Article 125. The word idiot is a noun which, whilst certainly pejorative, is not usually regarded as a swear word (certainly in the English language). It is critical but not normally regarded as insulting in a way which should merit criminal sanction.

3.3 Relevant International Standards

3.3.1 Freedom of Expression

The case clearly raises fundamental issues regarding the right to freedoms protected under Article 10 of the European Convention of Human Rights (ECHR).

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[1]; Dilipak v. Turkey, para. 63[2]). 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[3]; Lingens v. Austria, para. 40[4]).

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[5]) 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[6]; Wingrove v. the United Kingdom, para. 58[7]).

Applying the courts approach to the facts of the present case it seems clear that a criminal sanction to preclude illegitimate attacks against public servants pursues the legitimate aim of

protecting public servants carrying out duties in connection with the maintenance of the rule of law. Whether or not the offence created by Article 125 is a proportionate way of pursuing such an aim however is another matter. It provides for long prison sentences for single instances of behaviour which does not constitute an "attack" as such but is part of a political dialogue between two politicians debating a matter of public interest. The European Court of Human Rights (ECtHR) has on a number of occasions had cause to assess domestic rules which have the effect of stifling public debate between politicians and journalists. In the case of Oberschlick v. Austria (no. 2)[8] judgment of 1 July 1997 Mr Oberschlick was convicted for having insulted a Mr Haider by describing him as a Trottel (Austrian for "idiot") in the title and in the main body of an article he published in in a publication called Forum. The Regional Court considered that the word itself was insulting and that its mere use was enough to justify the conviction. The Vienna Court of Appeal took the view that the mere fact that the word in question also appeared in the title of the article made it insulting since readers who had read neither the article nor Mr Haider's speech and the comments on it would link the word not with what Mr Haider had said but with his own person. The ECtHR disagreed and pointed out in this connection that the judicial decisions challenged before it must be considered in the light of the case as a whole, including the applicant's article and the circumstances in which it was written. The article had been deliberately provocative (as were the comments of Interior Minister Suleyman Soylu when describing Mr İmamoğlu 's remarks at the Council of Europe). It was true that "that calling a politician a Trottel [idiot] in public may offend him" but "In the instant case, however, the word does not seem disproportionate to the indignation knowingly aroused by Mr Haider." The Court considered that the necessity of the interference with exercise of Mr Oberschlick's freedom of expression had not been shown and that his conviction was a violation of Article 10 (para 35 of the judgement).

> "The word idiot is a noun which, whilst certainly pejorative, is not usually regarded as a swear word (certainly in the English language). It is critical but not normally regarded as insulting in a way which should merit criminal sanction."

In Bodrozic v Serbia 32550/05[9] the Court was faced with a similar situation where the applicant's conviction was based on expressions he used to describe polemical statements made by one "JP" on public television concerning the existence and history of national minorities in Vojvodina, a muti-ethnic region, 35% of whose population was non-Serbian. He claimed that they were all "colonists" and that "there were no Croats in that region". The applicant described JP as "an idiot", "a fascist" and "a member of the fascist movement." The Court confirmed that "*there is little scope under Article 10 / 2 of the Convention for restrictions on debate on questions of public interest (see Nilsen and Johnsen v. Norway [GC], no. 23118/93, / 46, ECHR 1999VIII). In this connection, the Court observes that the discussion in the present case was clearly one of great public interest and the object of an ongoing political debate*." (/ 55 of the Judgement). Although the applicant had used harsh words which, particularly when pronounced in public, may often be considered offensive, his "*statements were given as a reaction to a provocative interview and in the context of a free debate on an issue of general interest for the democratic development of his region and the country as a whole*". Article 10 protects not only information and ideas that are favourably

received or regarded as inoffensive but also those that offend shock or disturb. The Court went on to reiterate that "*When assessing the proportionality of the interference the nature and severity of the penalties imposed are also factors to be taken into account*." (ibid. / 58). In that case a fine had been imposed on the applicant which could, if there was default, be replaced with 75 days' imprisonment. In the present case a period of imprisonment of over two years was imposed. The Court found a violation of the applicant's rights under Article 10 in the Bodrozic case. On any realistic analysis the violation of his rights under Article 10 in the case of Mr Imamoğlu was far greater.

3.3.2 Right to a Fair Trial

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

A fundamental component of the right to a fair trial is the right of any defendant to a defence. The ability of a defendant to present an effective defence depends on the ability to both effectively challenge prosecution evidence and present positive evidence in their defence. International human rights bodies will generally defer to national courts' assessments of facts and evidence, but there are exceptions when such an assessment constitutes a denial of their right to prepare a defence. Mr İmamoğlu's statement that he had addressed his comments to the Interior Minister and the corroboration of that statement by two witnesses who gave oral evidence appears to have been completely ignored by the judges who passed judgement on his comments. The only prosecution evidence appears to have been a recording of the comments made. The assessment of the intentions of Mr İmamoğlu with regard to the statement he made could only therefore realistically flow from the evidence he gave himself and any conflicting or corroboratory evidence adduced by the Prosecutor or Mr İmamoğlu. It appears that the Prosecutor adduced no evidence on this point. In the case of Mammadov v. Azerbaijan (No.2) (App.no. 919/15[10]) the ECtHr found a violation of the right to a fair trial on the basis that the conviction of an Azerbaijani opposition figure "*was based on flawed or misrepresented evidence"*, that "*his objections in this respect were inadequately addressed*" and *"[t]he evidence favourable to [him] was systematically dismissed in an inadequately reasoned or manifestly unreasonable manner*". The Court ruled that there had been serious shortcomings in the way that the evidence used to convict the defendant had been admitted, examined and/or assessed, leading to a finding that the trial was unfair. In view of the similar treatment which Mr İmamoğlu received in the present case there is a strong likelihood that the trial would be adjudged as unfair if put before the ECtHR.

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.

3.3.3 The Impartiality and Fairness of the Prosecutor in the Proceedings: UN Guidelines on the Role of Prosecutors

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 therule of law.

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".

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".

In view of the apparently unbalanced way in which the prosecutor approached their task in this case as highlighted above it seems doubtful that they have discharged their duties under the UN Guidelines.

4. Conclusion and Recommendations

4.1 Conclusion

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.

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 concerning.

The facts disclosed by the indictment do not appear to justify either the prosecution itself nor the conviction of the defendant for the offences with which he was charged.

The penalty imposed was severe and, if upheld, will have the effect of preventing Mr İmamoğlu from continuing in his position as mayor, or from running for other political offices. It is disproportionate to the wrong alleged.

4.2 Recommendations

First and foremost it is clear that the convictions of Mr İmamoğlu should be quashed. It is 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 the defendant. The prosecutions were also clearly in breach of Turkey's obligations under Article 10 of ECHR.

On 14th 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. 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 ICPCR 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.

Endnotes

1 https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-58278%22]}
2 https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-157399%22]}
3 https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22\%22CASE%20OF%20BARTHOLD%20v.%20GERMANY\%22%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-57431%22]}
4 https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22\%22CASE%20OF%20LINGENS%20v.%20AUSTRIA\%22%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-57523%22]}
5 http://hudoc.echr.coe.int/eng?i=001-73200 (available only in French)
6 http://hudoc.echr.coe.int/eng?i=001-82846
7 http://hudoc.echr.coe.int/eng?i=001-58080
8 https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22oberschlick%20v%20tria%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-58044%22]}
9 https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%2232550/05%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-93159%22]}
10 https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22919/15%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-178631%22]}

PEN NORWAY

Legal Report on Indictment: **Şebnem Korur Fincancı**

Helen Duffy

Forensic medicine expert and human rights defender Prof. Dr. Şebnem Korur Fincancı was arrested and sentenced to 2 years 8 months and 15 days in prison on charges of making propaganda for a terrorist organisation after stating in an interview that there could be some truth to allegations that the Turkish Armed Forces used chemical weapons during cross-border operations.

Legal Report on Indictment: Şebnem Korur Fincancı

Author: Helen Duffy

Introduction

This report contains the review and assessment of Indictment No 2022/8895, filed against Rasime Şebnem Korur Fincancı on 09/11/2022. Dr Fincancı is a medical expert and human rights advocate in Turkey. She was formerly the President (and now a member of the executive board) of the Human Rights Foundation of Turkey (TIHV) and, as set out in the indictment, she is still the President of the Turkish Medical Association. She is an academic at Istanbul University.

According to the indictment, on 19 October 2022, Dr. Fincancı was interviewed by Medya Haber TV. The interview is described as having been broadcast live, during a popular evening news bulletin. She was asked to comment on a video in the context of allegations of the use of chemical weapons by the Turkish military in northern Iraq. During the interview, in response to questions by the host and having seen the video, Dr Fincancı allegedly opined that toxic, chemical and poisonous gases had been used and that these allegations should be investigated in line with human rights standards. Her credentials appeared under her name, as is normal in such interviews. The indictment indicates that during her interview images of persons apparently killed by the chemical weapons in question were shown by Medya Haber TV and they were deceased PKK members, with subtitles referring to them as 'massacred' and 'guerrillas'.

On this basis, Dr Fincancı is charged with disseminating propaganda in favour of a terrorist organisation, under Article 7/2 of the Anti-Terror Law (TMK) in light of Articles 53, 58/9, and 63 of the Turkish Penal Code (TPC), Article 325/1 of the Criminal Procedure Code (CPC).

As will be set out and explained in full below, my assessment is that this indictment raises multiple extremely serious human rights concerns and is, on its face, incompatible with international human rights law (IHRL) standards binding on Turkey. These include in particular a violation of freedom of expression, of the principle of legality *nullum crimen sine lege* and of fair trial standards - including the rights to a strict and foreseeable application of criminal law and to be notified in detail of charges. It is my assessment that a review of this indictment leads to the inevitable conclusion that the prosecution of Şebnem Korur Fincancı on the basis of her television interview on the question of the alleged use by Turkey of chemical weapons is an abuse of criminal process and a violation of IHRL, which raises important questions regarding prosecutorial independence.

This review addresses the following key human rights concerns in turn:

- **Section 1** addresses concerns regarding *nullum crimen sine lege* and fair trial standards regarding notification of offences:
    - first, review of the factual basis for criminal charges, as set out in the indictment, and of the law in question, reveals a fundamental failure to identify how the alleged conduct and intent *of the accused* could give rise to individual

responsibility for the crime charged (disseminating terrorist propaganda); put simply, the indictment does not clearly allege still less support her responsibility for the elements of the crime charged as it is defined in law.

- second, the scope, lack of clarity and specificity of the crime of propagandizing, and in particular the unforeseeability of this crime being prosecuted in this case, raise additional concerns with respect for the principle of legality.

- **Section 2** addresses the related question of the compatibility of the indictment and prosecution of the accused with applicable international standards (in particular under the European Convention on Human Rights (ECHR) and ICPCR) in relation to freedom of expression (Article 10 ECHR, Article 19 ICPCR). While recognising freedom of speech can be restricted, and in exceptional circumstances criminalised, it notes that international standards provides factors to be taken into account in determining the lawfulness of such criminalisation. The content, context and lack of impact of the speech in question in the present case speaks to this as an example of protected speech in the public interest, and the incompatibility of prosecution on all the facts and circumstances of this case with free speech standards.

- **Section 3** raises additional concerns in respect of compatibility with;

  - i) the right to private life (Article 8 ECHR);

  - ii) concerns regarding abuse of criminal prosecution for ulterior motives (Article 18 ECHR);

  - iii) other relevant international standards in relation to the protection of human rights defenders and academic freedom

  - iv) the relevance of the ECHR obligations of the state to investigate

- **Section 4** ends by highlighting concerns regarding the relevance of evidence cited, evidence-gathering and questions concerning prosecutorial independence.

While the focus of this review - and the expertise of the author - relate to international standards, a few observations and questions regarding compatibility with Turkey's domestic law and procedure are also highlighted.

Section 1: Incompatibility of the Fincancı Indictment with Basic Principles of Criminal Law, *Nullum Crimen Sine Lege* and Fair Trial

a) International Standards on Individual Responsibility, Clarity and Specificity of Relevance to this Indictment Review

This section sets out in brief basic international requirements of criminal law which are violated in the present case. Their application to the facts in this indictment are set out in the sections that follow.

a-1) Nullum Crimen Sine Lege – Clarity of the Law and Foreseeability of its Application

Non-retroactivity, certainty, precision and foreseeability are prerequisites for any criminal law, consistent with basic 'rule of law' constraints. This is reflected across human rights law, including the ECHR and ICPCR, in the rule of '*nullum crimen sine lege*'.[1] Article 2 of the Turkish Penal Code likewise states that: *Nobody shall be subject to penalty or security measure for an act which is not clearly prescribed by law as a criminal offence. A penalty or security measure shall not be imposed unless it is prescribed by law.*[2] This codifies the principles of *nullum crimen sine lege* in domestic Turkish law.

This rule requires that laws must be formulated with clarity and sufficient precision to apprise

individuals of the requirements expected of them to bring their conduct into compliance with the law.[3] An individual must know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation and legal advice, what acts or omissions will give rise to criminal responsibility[4] to enable the individual to regulate his or her conduct to the law[5]. Where laws provide for the criminalisation and punishment of conduct that is broadly defined, a rule of law problem may arise, with implications for other important safeguards including the presumption of innocence, rules on burden of proof, and the fairness of the criminal process.

It also follows from the requirements of foreseeability at the heart of the *nullum crimen* rule that the application of the law – the decision to prosecute in the particular case – was foreseeable.[6] Concerns regarding the scope of the crime and its unforeseeable application to these facts is addressed below.

a-2) Restrictive Interpretation and Application

"Where laws provide for the criminalisation and punishment of conduct that is broadly defined, a rule of law problem may arise, with implications for other important safeguards including the presumption of innocence, rules on burden of proof, and the fairness of the criminal process."

A related basic rule of law principle, reflected in international criminal and human rights law, is that criminal law must be strictly applied and restrictively interpreted.[7] The ECtHR has noted that the criminal law must be restrictively interpreted and applied, cannot be interpreted by analogy and that any ambiguity should be resolved in favour of the accused. [8] The need for careful review by domestic courts of the scope of crimes and the application of criminal law in concrete cases is therefore essential, as has been made clear by ample jurisprudence and decisions of international courts criticising, for example, unduly broad definitions of terrorism-related offences including 'propagandising' for terrorism or "indirect incitement", for their lack of clarity and susceptibility to abuse.[9] Section (ii) below explains how the scope of the crime, and its unforeseeable application in this case, are at odds with these principles.

a-3) Individual Reponsibility, Established through Material and Mental Elements of the Crimes

Considerable lack of clarity emerges from the indictment as to the fundamental question of the nature of the alleged criminal conduct and intent of the accused. Criminal charges and punishment cannot be collective, but must be based on *individual* responsibility. They must be justified by and commensurate with culpable *conduct* and criminal *intent* of the individual, which must be made clear.

- ***Conduct - Resulting in Harm or Danger***: It is a basic principle that criminal law cannot punish thoughts, only criminal conduct of the accused.[10] Sharing thoughts or opinions becomes punishable only in exceptional circumstances, where it results in a harm protected in law, or at a minimum a real risk that a crime will be committed as a result, and an intent to commit or contribute to those crimes.[11] Where there is no reasonably proximate link between conduct of the individual and harm caused, or at least risked, as in this case, the charges will be unduly remote.

- ***Criminal Intent***: Intent is the basis for culpability in criminal law. More specifically, where the conduct in question is speech, and alleged to constitute a form of incitement to terrorism, international standards suggest a 'double intent requirement' should be met – the perpetrator intend to engage in the criminal expression and intend that it lead to the commission of one or more criminal terrorist offences. The absence of allegations and evidence regaridng criminal intent in this case is addressed below.

a-3) Detailed Notification of Charges

Turning to fair trial requirements, among the most basic procedural safeguards in any criminal process within a state governed by rule of law is that an accused must be advised of the factual basis of the charges, with clarity and specificity. This is reflected in articles 6(3) ECHR and 14(3) ICPCR, both of which make clear that everyone charged with a criminal offence has the 'minimum rights … (a) to be informed promptly, in a language which he understands *and in detail*, of the nature and cause of the accusation against him.[12] The ability to mount a defence and have a fair trial, and respect for presumption of innocence, naturally depend on such notification with clarity and specificity of the charges and basis. While some details as to evidence can be shared sufficiently before trial, international practice reflects that the right to be informed of charges arises at the outset and is essential to safeguard the legitimacy of the decision to bring criminal charges at all.[13]

Article 170/4 of Turkey's Criminal Procedure Code states that "*the events that comprise the charged crime shall be explained in the indictment in accordance to their relationship to the present evidence."*[14]. Thus, even in order to comply with domestic legislation, the prosecution must set forth in the indictment specific, clear and foreseeable facts related to the provisions in Article 7 of the Anti-Terror Law. The distinct lack of clarity as to the basis for the alleged responsibility of the accused for the crimes charged represents a fundamental flaw in the indictment in the present case.

b) The Facts and Law Set Out in the Indictment

b-1) The Crime Alleged in the Indictment

The indictment refers on p. 1 under 'applicable articles' to Art 7/2 of the Anti-terror law, alongside provisions of the Turkish penal code and the Criminal Procedure Code. The criminal law provisions themselves are not set out in the indictment.

Research reveals that "Propaganda of Terrorist Organisation" under Art. 7/2 of Anti-Terrorism Act (Law no. 3713), applied in the present case, reads as follows:

> *"Any person who disseminates propaganda in favour of a terrorist organisation by justifying, praising or inciting the use of methods constituting coercion, violence or threats shall be liable to a term of imprisonment of one to five years."*[15]

It must be noted that this definition was introduced by amendment dated 30 April 2013,[16] by virtue of which the elements underlined above were added to TMK Article 7/2. The result was to limit the crime of propaganda to statements made to justify, praise or incite the methods of violence used by a terrorist organisation. It is noteworthy that the goal of this amendment was specifically to harmonise the scope of the offence with ECHR standards and prevent excessive limitations on the freedom of expression. TMK Article 7/2 must therefore be applied in accordance with the principles of freedom of expression as understood by the ECtHR, set out above, consistent with IHRL and with the intention of the legislature.

Article 7 of the Anti-Terror law on its face entails three cumulative elements: (1) the individual must *disseminate propaganda in favour of a terrorist organisation*; (2) such dissemination must entail *legitimizing or condoning the methods of a terrorist organisation*; (3) specifically those condoned methods must entail *violence, coercion, threats*.

b-2) The Facts Alleged

The allegations of fact in the indictment are vague and presented in a repetitive and circular fashion, the relevance of many statements to the charges is at best unclear. However, it is clear that the allegations as set out in the indictment amounts to the following:

- Dr Fincancı was interviewed by a particular media outlet (allegedly supportive of PKK);
- Dr Fincancı was shown a video of deceased PKK members having been killed by chemical weapons, and responded by stating that toxic gases had been used, and that the issue "must be investigated within the scope of the Minnesota Protocol"[17].
- During her comments the media outlet allegedly showed images of deceased PKK members, referred to as "guerrillas" and it also showed Dr Fincancı's title.

It is noteworthy as a preliminary matter that the indictment does not precisely indicate why the impugned conduct of Dr Fincancı meets the elements of the crime of 'disseminating terrorist propaganda'. Indeed as noted below, the facts as presented in the indictment do not appear to meet the definition of that crime under domestic law.

- There is no allegation or evidence presented that her statements referred to or condoned 'violence, coercion or threats' by a prescribed organisation, as explicitly required by the law.
- There is no evidence lead as to how her statements related to 'legitimised' or condoned (or intended to legitimise or condone) the *methods* of a terrorist organisation at all.
- The discussion in which Dr Fincancı participated did not relate to conduct or methods of violence or coercion of the PKK. Notably, the facts as alleged do not support the view that she made comments about the PKK or its methods at all. and indeed did not mention or relate to violence by PKK in any way. It does not appear in dispute that her comments addressed the conduct of, and allegations of use of chemical weapons by, the Turkish *state*, and called for investigation of what appeared to her to be serious allegations of use of chemical weapons by the state. The fact the state's operation was against alleged terrorists would be irrelevant to whether there should be an investigation as Dr Fincancı suggested (see below Section 3). It cannot conceivably transform comments about methods used by the Turkish state into statements about methods of the PKK.
- There is no allegation or evidence that the speech incited violence, that it created a danger or proximate risk of such violence.
- There is no indication or allegation that the speech was *intended* to incite violence, or that it amounts to hate speech (see Section 2 below).
- There is no information provided as to how the defendant is deemed to have '*disseminated*' propaganda by being interviewed. There are multiple references to the images and language that were used by the media outlet during her interview, and its use of the accused's title. The indictment does not clearly state whether the applicant or the media outlet is alleged to have 'propagandised' and how. (It would be highly doubtful on the facts that the background images or descriptions could be deemed to constitute such propaganda in any event.) Likewise it is extremely unclear how simply being interviewed can constitute a plausible basis of the accusation that Dr Fincancı was 'disseminating' propaganda. There is no explanation of the scope of the crime for this purpose in the indictment.

One overarching feature of this indictment is that the alleged facts *focus more on the conduct of the media outlet than the individual accused*. The bulk of the conduct alleged relates not to Dr Fincancı's conduct but to the nature and conduct of the media outlet, including vague references to the network's relationship to the PKK. (It is noted however that it is not made clear that the outlet is a

banned organisation, and in any event this does not constitute the basis of the accused's criminal responsibility as alleged.) The vast majority of the facts and allegations relate to the media outlet having shown images or used language, which are not linked to the individual conduct and intent of the accused. The indictment at times suggests she is culpable for having spoken *to* them, her commentary and status being 'used' *by* them, but there is no apparent basis on which this could constitute the material and mental elements of the crime charged.

The accused's *intent* is not clearly identified, and is not in any way substantiated. The indictment appears based on assumptions as to knowledge, at odds with fundamental criminal law principles. It is alleged that her statement regarding chemical weapons and calling for the investigation amounted to an "attempt to legitimise the armed actions of the PKK" (para 9) and "portrayed the Turkish armed forces" in a certain light (para 10) and the "neutralisation of the members of the terrorist organisation as a guerrilla massacre". To the extent that these enshrine allegations of criminal intent, they appear to be based on *assumptions*, and are not backed up by evidence. Moreover, as noted above, they address indissociably the behaviour and attitude of a media outlet not of the accused.

These give rise to serious concerns as to how the charging practice in this case violates the principles set out in the previous section. There is no clear identification of culpable conduct and intent of the accused that could give rise to a legitimate prosecution in accordance with IHRL and principles of criminal law. [The additional concerns that criminalising expression of professional opinion give rise to are addressed in Section 2 below].

Finally, it is noted that there are several places in the indictment where *assumptions* of fact appear in place of supported reasoning. One example is the suggestion that the suspect could see the images and words while giving the interview. While not in my view relevant to her culpability of the inappropriateness of prosecution in this case, as background images of persons killed by chemical weapons or their description as 'guerillas' could not conceivably render her comments criminal, the assertion that it was 'clear' from looking at her on screen that she could see these images is unsupported and factually dubious.

In the same vein, criticisms of the accused are advanced in a manner disconnected from the crimes alleged. For example, the assertions that she commented on "unverified" activities of the Turkish Armed Forces, that she 'used' her title to cast the Turkish state in a negative light and thereby 'legitimise' the PKK are vague, prejudicial and do not reflect the elements of the crimes in Turkish law. This exacerbates the concerns regarding the legitimacy of the indictment process and the independence of the prosecuting authorities noted under Section 4.

c) The Law and its Application in Turkey: Problems related to the Elements of the Crime of Propaganda Under Article 7/2 of Anti-Terrorism Act (Law no. 3713)

c-1) Vagueness and Breadth of the Crimes Alleged

The constraints imposed by the principle of *nullum crimen sine lege*, (as well as the 'prescribed by law' test for permissible interference with free expression outlined at Section 2 below), require clarity, precision and foreseeability in the criminal law. So far as the crimes in question are unduly vague and their prosecution and punishment in the present case unforeseeable they fall foul of legal requirements. As the present case illustrates, uncertainty surrounds the scope and clarity of the crimes themselves - what constitutes 'propaganda', as opposed to the expression of professional opinion on matters of public interest, and what are the material and mental elements of this crime. Several dimensions of the concerns with criminal law are noted below.

c-2) Conduct not Alleged to Have Caused Harm or Created Danger: Remoteness of Connection between the Individual and Crimes

As noted above, criminal law is generally responsive to harm that has arisen as a result of the culpable conduct of the individual and exceptionally, to dangers or risks of such harm. For crimes of expression to be prosecuted, at a minimum there must be a clear link between the impugned speech and the

real and intended risk of harm.[18] Conversely, if there is no reasonable proximity between the person's expression and the claimed harm or risk that has arisen, the link will be too remote to justify individual responsibility, as reflected in for example, even in the broadly framed crime of provocation of terrorism in the CoE Convention, there is an explicit requirement that a statement must "cause a danger that an offence may be committed," and the EU Directive firms it up by specifying that a statement must "*manifestly* cause a danger that a terrorist act will be committed".[19]

The same requirements arise for terrorism-related crimes in domestic law, where the link between the individual prosecuted and harm caused - or at least risked - must be established in reasonable proximity. It is inherent in the individual (as opposed to collective) nature of criminal responsibility and punishment that individuals can only be punished 'for a harm that s/he has done or risked him or herself', rather than for speculative wrongs that may derive from the potential impact of ideas on others,[20] or from risks that may be created by others.

So far as propagandising for a terrorist organisation as a crime of endangerment (tehlike suçu) criminalises the (ill-defined) act of propaganda irrespective of the materialisation of harm, it may defy the close causal link that is required between the expression and the harm or risk. A key consideration in the assessment of the necessity of restrictions on speech and legitimacy of resort to criminal law set out in relation to ECHR jurisprudence (below) is the actual and real potential danger caused by impugned expression. Indeed the ECHR[21], the Office of the UN Commissioner for Human Rights, the Inter-American Commission on Human Rights and the Special Rapporteur for Freedom of Expression of the OAS have all lent their weight to the international standards indicating that the necessity test requires *"a direct and immediate connection between the speech and the violence to justify restrictions on free speech*[22].

By contrast, TMK Article 7/2 does not make any reference to the resulting harm, or even real danger that one or more offences may be committed as a result of the impugned statement. Without requiring even "credible danger" or a "reasonable risk of harm", any political statement could easily fall into the prohibited categories of expression under TMK Article 7/2. This raises multiple concerns, including the remoteness of any plausible connection between defendants such as the one in this case and the ultimate harm, namely acts of terrorism, which puts in jeopardy the principle of individual culpability underpinning criminal law. Notably in this case, the indictment does not indicate the nature of the harm caused or danger resulting from the accused's conduct.

Questions inevitably arise as to what type of deterrence is sought here. Normally, criminal law seeks to deter harmful conduct through the threat or imposition of punishment for harm to protected values, but in the absence of a clear connection with any type of harm, actual or potential, the only reasonable conclusion may be that what the authorities are trying to deter via prosecution is criticism of the state. Particular issues regarding this are addressed in Section 4.

Related concerns arise as to the requisite "intent" to cause criminal harm. As noted above, caution is required to ensure that perpetrators are punished commensurate with their criminal intent, which entails both a) intent to make the relevant statement and b) the intent to produce certain consequences. This is reflected for example in the CoE Convention and EU Directive, which refer to "intention" and "the risk of harm." so far as this is not incorporated in the crime of propaganda under TMK Article 7/2, which appears to require only the deliberate engagement of the perpetrator in the acts of justification, praise or incitement in the statement, the elements of the crime under TMK Article 7/2 do not appear to meet the basic requirements in respect of individual culpability based on conduct and intent under basic principles of criminal law.

c-3) International Criticism of the Interpretation and Application of Art. TMK 7/2 in Turkey

In recent years, there has been extensive criticism of anti-terror laws criminalizing the exercise of freedom of expression and assembly in Turkey, which have been condemned as violations of international human rights standards and the rule of law.[23] In particular at the ECHR, concerns have arisen for years as to the breadth and expansive interpretation of such laws - including the concepts of "aiding an illegal organisation without being a member of it" or "disseminating propaganda of a terrorist organisation" as contravening the principle of the 'foreseeability' and

disproportionately interfering with the rights to freedom of expression or assembly.[24] It is noteworthy that the combination of the application of broad terrorism offences in the context of weak evidence, has been highlighted as raising a fundamental problem in relation to the principles of legality and criminal law.[25]

These problems have included specifically in relation to Article 7/2 of the Anti-Terror Act where for example in *Belge v. Turkey*, the ECtHR found that the offence proscribed by section 7/2 and its interpretation by the domestic court to lack clarity[26].

As noted above, amendments were specifically introduced to overcome these difficulties, requiring the link to methods of violence. However, the Committee of Ministers has expressed concerns that TMK Article 7/2 as "still too broad and fails to define what the 'limits of reporting' are, and it fails to address the issue of intent".[27] The present case suggests that the amendments are not being adhered to, and certainly not being strictly interpreted in favour of the accused as required by the ECtHR.

In sum, the indictment is problematic for its incompatibility with nullum crimen sine lege, as regards both the law and, in particular, its application in this case. The Indictment fails to clearly indicate factual allegations based on the conduct and intent of the individual that fulfil all of the elements of Article 7 of the Anti-Terror Law in a clear and foreseeable manner so as to meet the requirements of IHRL

> "In recent years, there has been extensive criticism of anti-terror laws criminalizing the exercise of freedom of expression and assembly in Turkey, which have been condemned as violations of international human rights standards and the rule of law."

Section 2: Freedom of Expression (Criminalising Expression and Art. 10 ECHR)

The indictment makes clear this criminal prosecution is based on statements made by the accused expressing her opinion (in relation to the alleged use of chemical weapons by the state) in the context of a interview by Haber TV that was broadcast on public television. There is therefore apparently no doubt or dispute that the indictment represents restrictions on freedom of expression under Article 10 ECHR and Article 19 ICPCR.

It can be recalled at the outset that the prevention of terrorism is part of the positive human rights obligations of States to "ensure" respect for rights within their jurisdiction, as the ECtHR recalled in the *Beslan school siege*.[28] States are not only entitled, but in some circumstances obliged, to take measures to protect security and prevent terrorism, and IHRL reflects the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence (Article 20(2) ICPCR), propagandising for war (Article 20(3) ICPCR), racial hatred (CERD), or hate speech.[29] Preventive measures are required in a range of circumstances, including direct incitement to violent acts of terrorism.

However is so-doing freedom of expression must be strictly protected. Freedom of expression is also recognised by the ECHR as an essential social value for the healthy functioning of democracy,[30] and a prerequisite to guarantee 'the exercise of all human rights', including the right to freedom of thought, conscience and religion[31]. It is recognised as one of the

fundamental rights guaranteed under human rights treaties that have been ratified by Turkey and incorporated in domestic law. In the case of a conflict between the provisions of these human rights treaties and the ordinary laws, the former prevails over the latter in accordance with Article 90 of the Constitution.[32]

The right under Article 10 ECHR "include[s] freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers."[33] The ECtHR has reiterated frequently that this right extends not only to those ideas that are considered favourably, but also to those that "offend, shock or disturb the State or any sector of the population."[34] As the ECtHR noted, such are the demands of pluralism, tolerance and broadmindedness without which there is no "democratic society".[35]

As such, while the right to free expression is clearly not absolute, any restrictions must be in accordance with the test governing permissible restrictions enshrined in the treaties themselves.[36] This requires that they be prescribed by clear foreseeable law, pursue a legitimate aim, and be necessary and proportionate to that aim.[37] In assessing the permissibility of restrictions in the present case, it should be recalled that the test is not a broad balancing test, but one where restrictions must be strictly justified.[38]

To determine permissibility the ECtHR will take a holistic "look[s] at the interference in the light of the **case as a whole**, including the **content** of the impugned statements and the **context** in which they were made."[39]. ECHR jurisprudence has, however, set down additional parameters to assess permissible restrictions, including in context of multiple Turkish cases, some of which specifically relate to the interpretation and application of Article 7/2. On the basis set out below it is my assessment that Dr Fincancı's statements and interview as set out in the indictment do not meet the relevant criteria for permissible prosecution of free speech. On the contrary, several aspects of the court's jurisprudence make clear that the current conduct is strictly protected, and falls outside the acceptable parameters of criminal sanction for expressions of opinion under the Convention.

a) Constraining Principles Governing Freedom of Expression Under Human Rights Law

a-1) Restrictions and Criminal Law is not Clearly Prescribed by Law

The "prescribed by law" test ensures that the impugned measure has a legal basis in domestic law and that the law "is formulated with sufficient precision to enable the citizen to regulate his conduct and to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail."[40] The ECtHR reiterates that the quality of law criterion entails that the law should be accessible to the persons concerned and foreseeable as to its effects[41]. In *Imret v Turkey* (no.2) the Court points out that a rule constituting the basis for criminal liability must be formulated with sufficient precision, and afford a measure of protection against arbitrary interference by public authorities and against the extensive application of rights restrictions.[42] In this regard, both the criminal provisions as well as their application have to be clear, precise and foreseeable to afford sufficient protection against any arbitrary use of legal discretion.

The Council of Europe Guidelines on protecting freedom of expression and information in times of crisis underscore that "Member States should not use vague terms when imposing restrictions of freedom of expression and information in times of crisis. Incitement to violence and public disorder should be adequately and clearly defined".[43] Similarly, the Human Rights Committee emphasises that offences of "praising", "glorifying", or "justifying" terrorism, should be clearly defined to ensure that they do not lead to unnecessary or disproportionate interference with freedom of expression.[44]

The prescribed by law test, and particular stringent approach required in relation to the criminal law, reflects the fundamental principle of *nullum crimen sine lege* (above). Ongoing concerns regarding the scope and clarity of Turkish law on 'propagandising', and in particular the lack of foreseeability of the prosecution of this set of opinions under that particular charged, have been noted above.

a-2) The Prosecution does not Appear to Pursue a Legitimate Aim?

Prevention of crime and the protection of national security or public order may constitute legitimate aims, capable of justifying restrictions on free expression in certain circumstances. While these categories are broad, they are not open-ended or indeterminate. Although the legitimate aim criterion is not often the focus of attention by the ECtHR in reaching decisions, it is an important test[45] that should be considered carefully by Turkish courts to protect against overreach and misuse of terrorism and incitement laws for ulterior purposes.

It is doubtful from the face of the indictment that this restriction corresponds to the aims of national security or public order set out in the conventions. The speech called for an investigation into allegations against the state, which cannot in themselves give rise to a national security or public order danger, and as noted above no such danger or risk is alleged or supported. Given the emphasis placed on the role the interview may have played in bringing the Turkish state into disrepute, it should be recalled that the protection of the interests of "the state" as such, still less protecting it from criticism, is not itself a legitimate aim recognized in human rights treaties.[46]

"Given the emphasis placed on the role the interview may have played in bringing the Turkish state into disrepute, it should be recalled that the protection of the interests of "the state" as such, still less protecting it from criticism, is not itself a legitimate aim recognized in human rights treaties."

There would not appear to be a legitimate aim at issue in the present case. However, even if there were such an aim, the key question – as reflected in ample ECHR jurisprudence – is often the next criteria namely the necessity and proportionality of criminal prosecution.

a-3) Restrictions – In Particular Criminal Prosecution – Must be Strictly Necessary and Proportionate in all the Circumstances

Any limitation on freedom of expression must, on all the facts, be "necessary" – pursuant to a "pressing social need" – and proportionate to the specified legitimate aims.[47] The necessity test must not be misunderstood as a simple "balancing" test as "the choice is not between two conflicting principles but with a principle of freedom of expression that is subject to a number of exceptions which must be narrowly interpreted".[48] Accordingly, where a dispute arises, the burden of proving that any constraint on expression was permissible falls to the State.[49]

If expression is to be restricted on the ground that it poses a threat to national security, the danger posed must not be abstract or hypothetical. In this case however, there is no such harm or danger indicated in the indictment. However jurisprudence of the Inter-American and European human rights courts have made clear, it must for example involve at least "a reasonable risk of serious disturbance"[50] to the public order in a democratic society, rendering a restriction on freedom of expression justifiable[51]. The case-law of the EctHR often questions the "impact on national security or public order," potential impact or "clear and imminent danger"[52] in the assessment of whether there was a 'pressing social need' justifying the limitation of freedom of expression.'

When deciding whether the restriction on freedom of expression is necessary, human rights courts and bodies assess the situation on a case by case basis, in light of each case's particular facts and context.[53] The ECtHR 'look[s] at the interference in the light of *the case as a whole* to determine whether the restriction is proportionate, *including the content of the impugned statements and the context in which they were made'.*[54]

Criminal prosecution has often been described as an exceptional measure of ultimo ratio (last resort), which requires weightier considerations to justify its use as necessary and proportionate to speech. The ECtHR has noted in several cases concerning Article 10 that a criminal conviction is a serious sanction that must be strictly justified.[55] In this respect, the European Court has noted that *"the dominant position which the government occupies makes it necessary for it to display restraint in resorting to criminal proceedings"* in response to criticism.[56]

A review of case-law reveals the following factors and principles that have been relevant to the ECtHR's assessment of whether restrictions, including prosecution, has been justified by the necessity and proportionality test based on the content of the speech in the particular context .

b) The Content and Context – Incitement to Violence or Hatred?

The ECHR's assessment of the necessity of interference typically revolves around whether the content of the speech, in the particular context, incites or "call[s] for violence" or constitutes "incitement to hatred" violence or amounts to hate speech.[57] The red line over which protected speech cannot pass therefore is when the statement constitutes a call for violence, armed insurrection or uprising, or infuses hatred likely to increase violence or jeopardise physical integrity[58].

A large body of jurisprudence of human rights courts, including a significant number of Turkish cases before the EctHR,[59] and broader international practice including the Security Council (SC) Resolution 1624,[60] regional standard-setting such as the Council of Europe Convention on the Prevention of Terrorism[61] ('the CoE Convention') and the EU Directive on Combatting Terrorism[62] ('the EU Directive') reflect that in exceptional circumstances incitement or provocation of terrorism can be criminalised. However, these standards also make clear that the lawfulness of prosecuting speech depends on certain strict constraints. As noted above in relation to individual responsibility as a fundamental criminal law principle, there should however be a close relationship between the speech and the harm, or at a minimum danger or risk created by the speech in question. As such, the UN Secretary General has emphasised how the crime of incitement reflected in SC Resolution 1624 should be interpreted and limited: *[L]aws should only allow for the criminal prosecution of direct incitement to terrorism, that is, speech that directly encourages the commission of a crime, is intended to result in criminal action and is likely to result in criminal action (emphasis added)*[63]

IHRL suggests that a key consideration is again the proximate relationship between the speech and incitement to violence, which must be distinguished from for example speech which is deemed supportive of groups or causes. The case-law of the ECtHR supports a strict approach to what constitutes incitement to violence and provides guidance on what type of expressions do *not* amount to such incitement, of relevance to this case.

In this regard, the Court has noted that 'a message of intransigence as to the objectives of a proscribed organisation cannot be confused with incitement to violence or hatred'.[64] Restrictions require more than the use of words such as 'resistance', 'struggle' or 'liberation', or 'accusations of "state terrorism" or "genocide"'.[65] Similarly, expressing support for a leader of a 'terrorist organisation' without further incitement to violence does not suffice.[66]

The ECtHR has also stated that neither publication of a statement by a person who is a member of an illegal organisation[67] nor a harsh public criticism of government policies[68] would itself justify the restriction of freedom of expression.

Greater latitude is given to states in certain contexts none of which are relevant to the impugned speech in this case.[69] The Court has shown more deference to restrictions made on speech that

related to attacks by terrorist organisations in the immediate aftermath, [70] or to armed violence by such groups in areas where there is an intense history of violence.[71]

The key question has remained whether the statements, fairly construed and seen in their immediate or wider context, could be seen as a direct or indirect call for violence, hatred or intolerance[72]). In the absence of a call for violence or hatred, expressions which discuss causes or sources of terrorism or unrest, or indeed support unorthodox or anti-democratic ideas, for example defending sharia, without calling for violence to establish it,[73] enjoy protection under Article 10.

In this case, Dr. Fincancı did not in any capacity make any statements calling for the incitement of violence, nor could the statements in the indictment be construed in this manner as they did not relate to or support, still less call for, violence by the PKK or other group. It follows with greater force, that speech that may be deemed to criticise the authorities' conduct, without incitement to violence in response, cannot be subject to restrictions or prosecutions as the Court has consistently made clear. [74]

b-1) The Content not the Source of the Information as Key, and Support for Groups (In Fact of Perceived) is Insufficient

The ECHR has distinguished the content of speech from its source, such that restrictions on publication of statements (which did not advocate violence) could not be justified on the basis that they were made by or through a banned organisation.[75] Thus even if the media outlet had been a banned organisation (which is not the allegation in the indictment), the key question would remain the nature of the speech in question and whether it advocated violence or hatred in the particular context.

Also of potential relevance to the present case is the Court's finding that it is insufficient that the opinion expressed by individuals is *supported* or *shared by an illegal organisation*. As stated by both former and current European Commissioners for Human Rights, Hammarberg and Muižnieks, whether expressions of opinion may have coincided with the aims or instructions of an illegal organisation cannot be the guiding criteria.[76] Likewise in *Erkizia Almandoz v. Spain*, the ECtHR found a violation of Article 10 where someone was convicted for giving a speech at a rally to honour a deceased member of ETA as the matter discussed was one of general public debate (an area which the court states there is little margin for restriction as noted below) and that the penalty imposed was excessive given the circumstances.[77]

b-2) Speech in Public Interest and on Issues of Public Debate

Particular protection is due to political speech or speech relates to an issue of public interest. In this case, the indictment can be seen as infringing on Dr Fincancı's right to freely speak about an issue of public interest, namely possible use of chemical weapons violations by State agents. The lawfulness of their use, and the concern arising from them, does not depend on the nature of victims and whether they were members of the PKK as is alleged. The issue remains an important of public concern on which there is little room for the government to limit free speech.

The fact that several others – including international actors and media[78] …have also raised such concerns and called for investigation underscores the legitimacy of the request for an investigation and the lack of reasonable basis for criminalisation of expression in this case.

The ECHR has made clear that political expression, including on an issue of human rights protection as in this case, deserves a very high level of protection[79]. One relevant case in this respect is *Güçlü v. Turkey*, where the applicant, a lawyer and politician, stated during a press conference that Turkey's actions in 1915 amounted to genocide and that Turkey needed to come to terms with this and engage in open debate on this issue. The Court found that Mr Gulcu's statement had clearly concerned a debate on a question of public interest and that expression of such opinions; even if they did not match those of the public authorities and could offend or shock some, debate by definition consisted in the expression of divergent points of view, which had to be protected under Article 10[80]. Therefore, even if the Turkish authorities disagree with

the statements made by Dr Fincancı, they must be afforded a high level of protection and cannot be criminalised in line with her right to express herself guaranteed by Article 10 ECHR.

Likewise the ECtHR has emphasised the importance of *media freedom* in a democratic society, accepting that even groups that support extremist ideas should be able to find ways to express themselves peacefully and for the public to be informed of them.[81] The impugned statements made by Dr Fincancı were made on a popular evening programme, which could be argued is utilised as a democratic tool and necessary in a democratic society. The Court has also paid close attention to the immediate *context* and *manner* in which the statements were made and the implications for the impact of the statements. In *Gündüz v. Turkey*,[82] where statements had been made in the course of a pluralistic televised debate, any negative effect was lessened. This can be contrasted to *Féret*, where anti-immigrant statements were made on electoral leaflets and the Court noted that 'political speech that stirred hatred based on religious, ethnic or cultural prejudices was a threat to social peace and political stability in democratic States.' [83] The former case is directly relevant to the indictment of Dr Fincancı where the statement regarding the use of chemical weapons and the need for an independent investigation were not only matters of public concern, but they were made in a reserved and academic expert manner and on public television channel.

> "The indictment infringes upon this right as the government seeks to penalize Dr. Fincancı for exercising her profession as a medical professional, a professor, and as a human rights advocate. Reliance on the use of her title during the interview is relied upon as a putative basis for finding her culpable raises further serious doubts in this respect."

Dr Fincancı's statements cannot be seen as a call for hatred, violence or intolerance. They stand in sharp contrast to those cases where the court has found restrictions permissible – such as *Taşdemir v Turkey*, where the applicant stated, "Biji Serok Apo, HPG cepheye misillemeye" (Long live Apo! HPG [the armed wing of the PKK] to the front line in retaliation!) for example. Here, the ECtHR viewed the content and the context of slogans are their link with engagement in violence, stand in contrast to the content and context set out in the present indictment that cannot plausibly justify restrictions on free speech in light of the ECHR's jurisprudence to date.[84]

b-3) Statements regarding Information in the Public Domain

It is also noted that the case does not allege that information was placed in the public domain by the accused, but rather it concerned comments on pre-existing reports. This was relevant in *Handyside*, where part of the Court's assessment in concluding that there had been a violation of Article 10, was that the stories were already offered in the public domain. Dr Fincancı's statements regarding Turkey's suspected use of chemical weapons in violation of the Chemical Weapons Convention had been documented by other independent reports and mainstream media outlets.[85] The statement of opinion related to information that was both already in the public domain and which concerned a matter of the public interest.

It is important to note that when the ECtHR factors are considered as a whole, it is evident that the Turkish authorities have insufficiently demonstrated why Dr Fincancı's statements amount to the dissemination of propaganda as defined in clear

accessible law, and why the serious interference through criminal law is strictly necessary and proportionate in a democratic society.

Section 3: Other International Standards Relevant to the Lawfulness of Criminal Charges in the Fincancı Case

This section draws attention, more briefly, to additional violations that may arise were a prosecution to proceed on the basis set out in the Reviewed Indictment.

a) Prosecution for Ulterior Purpose in Violation of Article 18?

Article 18 has recently been invoked by the ECtHR in several Turkish cases involving misuse of state power through repressing dissent or excessive criminalisation; both of these issues deserve consideration in the present case.

The ECHR has held that Article 18 is violated when "the restriction of [an] applicant's right or freedom was applied for an ulterior purpose" as assessed "from the combination of the relevant case-specific facts"[86]. Where "there was a plurality of purposes," the Court would base its determination on the dominant purpose.[87]

In *Rasul Jafarov v Azerbaijan and Aliyev v Azerbaijan*, the totality of circumstances led the Court to conclude that in both cases "*the actual purpose of the impugned measures was to silence and punish the applicant for his activities in the area of human rights*."[88] In these cases, and the recent case of *Selahattin Demirtaş v. Turkey (*No 2), the Court has pointed to several indicators or factors that may, in all the circumstances, point to such an ulterior purpose. These have included, evidence showing a "larger campaign to crack down on human rights defender," a "general context of the increasingly harsh and restrictive legislative regulation of NGO activity and funding," and a practice of stifling dissent by using criminal law measures in particular and a lack of judicial independence.[89] Recently, in Kavala v Turkey, the Grand Chamber stated that, it was established "beyond reasonable doubt" that measures were instituted against him, contrary to Article 18, to "reduce him to silence" and to have a "dissuasive effect on the work of human rights defenders".[90]

Where the state is using incitement and provocation of terrorism to repress dissent, to silence human rights defenders directly or through the chilling effect, this will fall foul of Article 18.[91]

b) Violations of the Right to Private Life (Art. 8 ECHR)

The indictment could be seen as a disproportionate interference with Dr. Fincancı's right to private and professional life protected under Article 8 ECHR. The ECtHR has held that the protection of private life extends to the development and exercise of one's professional life, including through expert opinions on issues related to professional experience.[92] The Court recognises this includes relationships "of a professional or business nature",[93] and the interplay between professional life and other fundamental aspects of Article 8, namely personal, social and intellectual autonomy, identity and self-development.[94]Likewise, the Court has held that "it is not always possible to distinguish clearly which of an individual's activities form part of his professional or business life and which do not. Thus, especially in the case of a person exercising a liberal profession, his work in that context may form part and parcel of his life to such a degree that it becomes impossible to know in what capacity he is acting at a given moment of time".[95]

The indictment infringes upon this right as the government seeks to penalize Dr. Fincancı for exercising her profession as a medical professional, a professor, and as a human rights advocate. Reliance on the use of her title during the interview is relied upon as a putative basis for finding her culpable raises further serious doubts in this respect.

c) Academic Freedom

Relatedly, Dr Fincancı should be able to freely exercise her academic freedom as a researcher and academic. The importance of academic freedom is recognised in a growing body of regional

and global law and practice. International treaties,[96] jurisprudence of this Court[97] and others,[98]and soft law instruments (including of the CoE),[99] embrace academic freedom and the fundamental principles that underpin it. The EU Charter on Fundamental Rights clearly states that "academic freedom shall be respected".[100] The Turkish Constitution refers to the freedom to "study and teach, express, and disseminate science and the arts, and to carry out research in these fields freely".[101] The Court has noted the need for "careful scrutiny [of] any restrictions on the freedom of academics to carry out research and to publish their findings".[102]

d) The Need to Ensure an Enabling Environment for Human Rights Defenders

The nature of the speech in question, and the role of the accused, also raise questions as to compatibility of the prosecution with the responsibility of the state to create an 'enabling environment' for human rights defenders (HRDs). International and regional human rights bodies[103] have expressed concern,[104] including in relation to unwarranted pre-trial detention and prosecutions of HRDs, in a manner described as "judicial harassment."[105] The UN Special Rapporteur on freedom of expression is among those expressing concern about the impact of criminal law on free expression, "squeezing of civil society space" and "radical backsliding of Turkey's democratic path".[106]

The ECtHR has emphasized repeatedly the "public watchdog" role of HRDs and called for the strictest scrutiny of measures against them[107] which may have a chilling effect on civil society "who, for fear of prosecution, may be discouraged from continuing their work of promoting and defending human rights."[108] It has noted "states must focus on the protection of critics of the government, civil society activists and human rights defenders against arbitrary arrest and detention," taking measures to "ensure the eradication of retaliatory prosecutions and misuse of criminal law" against these vulnerable groups.[109]

The UN Declaration on Human Rights Defenders (Declaration)[110] the Committee of Ministers' (CoM) Declaration on CoE Action to Improve the Protection of Human Rights Defenders and Promote their Activities (CoE Declaration) and subsequent Parliamentary Assembly resolutions[111] all similarly call on states to ensure an 'environment conducive' or 'enabling enivronment' for the work of HRDs.[112] Resort to criminal investigation and prosecution, and detention of HRDs, as a particularly coercive and problematic form of interference is reflected in the Declaration and other standards, such as the OSCE Guidelines which provide that HRDs *"must not be subjected to judicial harassment by unwarranted legal and administrative proceedings or any other forms of misuse of administrative and judicial authority, or to criminalization, arbitrary arrest and detention."*[113]

The UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms,[114] enshrines the right to promote and seek protection of human rights.[115] Notably in Article 8 it specifically provides that individuals shall have the right to *criticise* government and draw attention to conduct that hinders or impedes human rights[116] (which is reflected in art 7/2 of the Turkish law amendment allowing expression for the purpose of criticizing too). Article 9/3 protects the rights of individuals to make a complaint to the government[117] while Article 12 requires individuals to be protected under national law for reacting against or opposing, in a peaceful manner, governmental actions that violate human rights.[118]

Turkey's prosecution of Şebnem Korur Fincancı, far from creating an enabling environment for defence of human rights, protecting criticism of possible human rights violations, explicitly condemns her for this for criticising the state and making proposals in respect of human rights protection. The right to call on the government to investigate an alleged violation of human rights is, as noted below, an essential dimension of the protection of human rights of others.

e) The Duty to Investigate Under the ECHR

It is antithetical to the ECHR to prosecute someone for calling on the state to take measures it is required to take under the Convention. These include the duty to investigate serious violations of the right to life, including through the use of chemical weapons.

Under the ECHR, States are obliged to conduct an investigation into allegedly unlawful deaths which occurs as the result of the use of force by State officials.[119] This obligation is triggered whenever the matter comes to the attention of State officials and they must conduct the investigation of their own volition, without the need for a formal request to be lodged by the next of kin or other civil society actors.[120] Dr Fincancı was therefore invoking the states responsibility to conduct an independent investigation. The ECHR provisions set out above, requiring restraint in criminal law, and strict necessity and proportionality of restrictions through criminal law of free expression must be interpreted in light of these obligations under the same Convention.

Section 4: Other Prosecutorial Issues

A final set of concerns relate to prosecutorial independence. The principle that investigations and prosecutions must be conducted independently and impartially is also a key rule of law requirement. This indictment which was issued by the Chief Prosecutor in the Terrorism Crimes Investigation Office refers to the fact that the investigation was launched by the General Directorate of Legal Services of the Ministry of National Defence (indictment p.1), which immediately raises questions as to whether the investigatory and prosecutorial decisions meet these requirements.

In multiple respects the tone and content of the indictment, referred to throughout this review, raises serious doubts in this respect. In conflict with the IHRL standards, she is being prosecuted at the behest of Ministry of Defence for her criticism of the actions of the Ministry of Defence. The suggestion that calling for an investigation, and thereby portraying the 'armed forces responsible for defence and protection of the indivisible integrity as having been engaged in an illegal act' was a criminal behaviour, and concluding that the activities of the armed forces were 'legal activities of the Turkish armed forces under the scope of legitimate self defence…' are examples. By contrast, references to 'neutralised terrorists' and objecting to the use of the term 'massacres' contributes to value-laden commentary and politicised discourse inappropriate for a criminal indictment.

Similar concerns arise from the inclusion of prejudicial evidence of doubtful relevance to the charges in the indictment. The indictment refers to the accused's "prior social media posts" There is no further information in the indictment pertaining to what these social media posts say and what weight they were given in the decision to indict Dr. Fincancı. The implication that her prior statements or conduct are consistent with her prosecution, without clarifying their relevance, is prejudicial. Criticism of the accused for commenting on a video without having been 'on-site' and refuting her expert conclusions are of dubious relevance.

The reference to the prosecutor seizing Dr. Fincancı's digital materials and that the outcome of the examination can be "added to the file at the stage of prosecution" raises doubts as to a possible 'fishing expedition'being conducted by the prosecution. If the allegations in the indictment relate to Dr. Fincancı's statement, and use of her title with the Turkish medical association in the video interview, it is not clear how her social media posts, or the digital materials that were seized, are relevant to the prosecution's case. This also raises fair trial concerns, potentially impeding the preparation of an adequate defence particularly if additional charges not in the original indictment are added at a later stage.[121]

The Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors adopted by the International Association of Prosecutors in 1999 state that prosecutors must proceed with a criminal case only when it is well-founded on evidence that is reasonably believed to be both reliable and admissible at trial.[122] The prosecution in this case does not appear to be in compliance with this standard.

The crimes alleged, the factual basis set out in the indictment and the evidence referred to are manifestly insufficient to constitute reasonable suspicion of criminal activity. The indictment is, on its face, flagrantly incompatible with Turkey's obligations under IHRL detailed in this Indictment Review.

Endnotes

1 Art 7 ECHR; Article 15 of the International Covenant on Civil and Political Rights (ICPCR); Ashworth and Zedner, Preventive Justice (OUP, 2014), pp. 113-114.
2 Turkish Criminal Code, Article 2.
3 The Sunday Times v. United Kingdom (No. 1), app. no. 6538/74 (1979) / 49.
4 Cantoni v France, app. No. 17862/91
5 Venice Commission, Rule of Law Report 2011.
6 Garzon v Spain UNHRC (2021).
7 See eg. Article 22 (2) of the Rome Statute of the International Criminal Court
8 Sahin Aplay v Turkey, app. no. 16538/17, (2018). para. 116. See also e.g. ECHR, Capeau v Belgium (Application no. 42914/98), 13 January 2005, para. 25; Jeremy McBride, Human rights and criminal procedure: The case law of the European Court of Human Rights (Council of Europe Publishing, 2009), p. 184. www.echr.coe.int/documents/pub_coe_criminal_procedure_2009_eng.pdf
9 See eg. Duffy and Pitcher,'Indirectly Inciting Terrorism? Crimes of Expression and the Limits of the Law' in Benjamin J Goold and Liora Lazarus, Security and Human Rights
10 The Roman Law principle cogitationis poenam nemo patitur translates as "nobody endures punishment for thought". Justinian's Digest (48.19.18).
11 Duffy and Pitcher,'Indirectly Inciting Terrorism? Crimes of Expression and the Limits of the Law' in Benjamin J Goold and Liora Lazarus, Security and Human Rights, supra.
12 Art 6(3) ECHR; article 14(3) ICPCR likewise provides that "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him…"
13 See eg Prosecutor v. Kupreskic AJ, at para. 114: The Appeals Chamber notes that, generally, an indictment, as the primary accusatory instrument, must plead with sufficient detail the essential aspect of the Prosecution case. If it fails to do so, it suffers from a material defect. see generally paras 88-114. https://www.icty.org/x/cases/kupreskic/acjug/en/
14 https://sherloc.unodc.org/cld/uploads/res/document/tur/2005/turkish_criminal_procedure_code_html/2014_Criminal_Procedure_Code.pdf
15 Anti-Terror Law, Art. 7
16 Article 7/(2) of Law no. 3713 on the Fight against Terrorism in Turkey was amended on 30 April 2013 by Law no. 6459 to bring the provisions closer into line with the ECHR. According to the reasoning of the amendment of Article 7/(2) made by the Law no. 6459, "European Court of Human Rights finds that punishing individuals under Article 7 of the Anti-Terror Law due to their statements that do not contain any expression of encouragement to resort to violence or which do not qualify as incitement to armed rebellion is contrary to freedom of expression. The amendment which added certain qualifications in the offence is made in a view to making the scope of the offence "harmonized with ECHR standards" (Article 6).
17 Minnesota Protocol Article 27.
18 Duffy and Pitcher,'Indirectly Inciting Terrorism? Crimes of Expression and the Limits of the Law' in Benjamin J Goold and Liora Lazarus, Security and Human Rights , page 374 - 377
19 EC, Proposal for a Council Framework Decision amending Framework Decision 2002/475/JHA on combating terrorism, Doc. COM 2007 0650 (6 November 2007), p.450.
20 Ashworth and Zedner, Preventive Justice (OUP, 2014), p. 112.
21 Çamyar and Berktaş v. Turkey, No. 41959/02, 15 February 2011, para.42. Gül and Others v. Turkey, No. 4870/02, 8 June 2010, para.42
22 Joint Press Release of 23 February 2017 on Honduran Penal Code: http://www.oas.org/en/iachr/expression/showarticle.asp?artID=1054&lID=1; See also the Joint Declaration on Freedom of Expression and Countering Violent Extremism adopted by the Rapporteurs on Freedom of Expression in 2016 at http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=19915&LangID=E; Johannesburg Principles on National Security, Freedom of Expression and Access to Information ('Johannesburg Principles'), UN Doc E/CN.4/1996/39.
23 see eg. Venice Commission, Opinion on Articles 216, 299, 301 and 314 of the Penal Code of Turkey, CDL-AD(2016)002, 15 March 2016, para. 106; Concluding observations on the initial report of Turkey adopted by the Committee at its 106th session (15 October - 2 November 2012), para.16; CommDH(2017)5, (note 82) para. 124; Report of the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression on his mission to Turkey, A/HRC/35/22/Add.3, adopted 7 June 2017; Memorandum on Freedom of Expression and Media Freedom in Turkey, by Nils Muižnieks, Council of Europe Commissioner for Human Rights, 15 February 2017; and ECHR case law referred to herein.
24 Turkish ECHR cases on point include Yılmaz and Kılıç v. Turkey (68514/01); Gül and others v. Turkey (4870/02); Gülcü v. Turkey; Işıkırık v. Turkey no. 41226/09, 14.11.2017; İmret v. Turkey (No. 2), No. 57316/10, 10 July 2018.
25 Ekin Association v. France, No. 39288/98, 2001, para. 46; Kızılyaprak v.Turkey, no: 27528/95 para. 25; Faruk Temel, no. 16853/05, 1 February 2011, para. 61-62; Öner and

Türk v. Turkey, no. 51962/12, para 24; Özgür Gündem v. Turkey, no: 23144/93, para 60.

26 Belge v. Turkey, No: 50171/09, 06 December 2016, para.29.

27 The Committee of Ministers, Communication in Öner and Türk v Turkey, app. no. 51962/12

28 ECHR, Tagayeva and Others v Russia (Application no. 26562/07), 13 April 2017. Russia was in violation for its failure to prevent (as well as to adequately respond to) identifiable threats of terrorism. On the debate around the extent and nature of the positive obligations, which may conflict with other rights, see Liora Lazarus, "Positive Obligations and Criminal Justice: Duties to Protect or Coerce?" (OUP, 2012) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2214508

29 An ECHR Fact sheet on hate speech jurisprudence can be found at https://www.echr.coe.int/Documents/FS_Hate_speech_ENG.pdf. Note that hate speech is, or should be, a narrow category, which can also be subject to abuse. See eg Nils Muižnieks, Council of Europe Commissioner for Human Rights, "Memorandum on freedom of expression and media freedom in Turkey" Doc CommDH(2017)5 15 February 2017, paras. 119-120, reporting abuse of the hate speech rationale by the Turkish state to justify measures against persons deemed to have insulted the religious views of the majority.

30 ECHR, Handyside v the United Kingdom (Application no. 5493/72), 7 December 1976, para. 49: "Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man."

31 UN HRC General Comment no. 34 (2011), para. 2; Boyle & Shah in Moeckli, Shah & Sivakumaran (eds), International Human Rights Law (2nd edn OUP 2014), p. 217.

32 Art. 90 of the Constitution: "In the case of a conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail. "

33 ECHR, art. 10.

34 Handyside v. United Kingdom, app. no. 5493/72 (1976) / 49.

35 ibid; and ECHR, Gündüz v Turkey (Application no. 35071/97), 4 December 2003, paras. 40 and 51.

36 Article 19 of the International Covenant on Civil and Political Rights (ICPCR), Article 19 of the Universal Declaration of Human Right; Article 10 of the ECHR, Article 13 of the IACHR and Article 9 of the ACHPR.

37 For example, Article 10(2) ECHR makes clear the interference must be 'prescribed by law and … necessary in a democratic society, in the interests [inter alia] of national security, territorial integrity or public safety, for the prevention of disorder or crime, [or] for the protection of health or morals'.

38 Ceylan v. TurkeyNo. 23556/94), 8 July 1999, para. 32; Zana v Turkey (Application no. 69/1996/688/880), 25 November 1997, para. 51.

39 Sürek v. Turkey (no. 1), no. 26682/95, para 58; Özgür Gündem v. Turkey, no: 23144/93, para 57

40 Öztürk v. Turkey [GC], no. 22479/93, para. 54..

41 Imret v Turkey (no.2), (Application no: 57316/10), 10 July 2018, para.42.

42 Ibid, para.53; Malone v. the United Kingdom, Application No. 8691/79, 2 August 1984, par. 67.

43 Venice Commission, Report on Counter-Terrorism and Human Rights, Study no. 500/2008, CDLAD(2010)022, 05 July 2010.

44 Human Rights Committee, CPCR/C/GC/34, General Comment 34, adopted 12 September 2011, para. 46.

45 Perincek v. Switzerland, No. 27510/08, 15 October 2015, para.145; Izmir Savas Karsitlari Dernegi v. Turkey, No. 46257/99, 2 March 2006, para.35.

46 Council of Europe Commissioner for Human Rights, Memorandum on Freedom of Expression and Media Freedom in Turkey, CommDH(2017)5, 15 February 2017.

47 Handyside v United Kingdom (n 5) para. 49.

48 Sunday Times v United Kingdom (no. 1) (Series A, no. 30), 29 March 1979, para. 65.

49 UNGA, Promotion and protection of the right to freedom of opinion and expression, 6 September 2016, UN Doc. A/71/373, para. 9 – quoting UN HRC General Comment No 34. (2011), paras. 27 and 21.

50 Inter-Am. C.H.R., Francisco Uson Ramirez v Venezuela, judgment of 20 November 2009. Case 577-05, Report No. 36/06, Inter-Am. C.H.R., OEA/Ser.L/V/II.127 Doc. 4 rev. 1 (2007), para 89.

51 e.g. Zana v. Turkey, No. 18954/91,25 November 1997; Surek v. Turkey (No.1), No. 26682/95, 8 July 1999; Surek v. Turkey (No.3) No. 24735/94, 8 July 1999; Medya FMŞener v. Turk Reha Radyo ve Iletisim A.S v. Turkey

52 Gül and Others v. Turkey, No. 4870/02, 8 June 2010, para.42.

53 legal standards inevitably become somewhat intertwined with particular facts. For an example see Leroy v. France, No. 36109/03, 2 October 2008, paras. 3-8.

54 Ceylan v Turkey (n 12), para. 32.

55 Lehideux and Isorni v. France , no. 24662/94

56 Ibid.

57 e.g. Halis Doğan v Turkey (no. 2), (Application no. 71984/01), 25 July 2006; ECHR,

Fatullayev v Azerbaijan, Judgment (Application no. 40984/07), 22 April 2010; Sener v Turkey; Ozgur Gundem v Turkey (Application no. 23144/93) 16 March 2000, ECtHR, Reports 2000-III; and Surek v Turkey (no. 2) (Application no. 24); Müdür Duman v. Turkey, No 15450/03, 6 October 2015. Gözel and Özer v.Turkey, No. 43453/04, 6 July 2010, para 56, 60.

58 Surek v. Turkey (No.1), No. 26682/95, 8 July 1999.

59 e.g. ECHR, Halis Doğan v Turkey (no. 2) (Application no. 71984/01), 25 July 2006;; Ozgur Gundem v Turkey (Application no. 23144/93), 16 March 2000; and Surek v Turkey (no. 2) (Application no. 24); Müdür Duman v Turkey (Application No 15450/03) 6 October 2015.

60 UN Security Council Resolution 1624 (2005), UN Doc. S/43S/1624 (2005), paras. 1 and 3.

61 Adopted on 16 May 2005. See: https://rm.coe.int/168008371c

62 Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA. See: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32017L0541&from=EN

63 UN General Assembly, "The protection of human rights and fundamental freedoms while countering terrorism: Report of the Secretary General" (28 August 2008), UN Doc. A/63 Office of the United Nations High Commissioner for Human Rights, Factsheet on Human Rights, Terrorism and Counter-Terrorism (no. 32)

64 Surek and Ozdemir v. Turkey, Nos. 23927/94 and 24277/94), 8 July 1999, para. 61.; Erdogdu v. Turkey, Judgment, No. 25723/94), 15 June 2000, ECtHR, Reports 2000-VI and Ceylan v. Turkey, No. 23556/94, 8 July 1999.

65 Ceylan v Turkey, (n 12), para 34

66 ECHR, Yalçinkaya and others v Turkey, 24 June 2014, (French) para 34; the criminal prosecution for expressing a 'mark of respect' for a leader of a deemed terrorist organisation – in the absence of inciting violence or endorsing violent activities – constituted an unjustifiable limit on free expression.

67 Gözel ve Özer – Türkiye, 6 Temmuz 2010

68 Belek- Türkiye, 20 Kasım 2012; Demirel ve Ateş – Türkiye, 12 Nisan 2007.

69 Sürek and Özdemir v. Turkey , Nos. 23927/94 and 24277/94

70 For example, in Lehideux and Isorni v. France, the Court ruled, referring to remarks made in a eulogy about a French Nazi collaborator, that 'it [is] inappropriate to deal with such remarks, forty years on, with the same severity as ten or twenty years previously.' ECHR, Lehideux and Isorni v. France, No. 55/1997/839/1045, 23 September 1998, para 55.

71 In Leroy v France, the fact that the cartoon was featured in a publication in the Basque region, an area particularly sensitive to national security threats, was a factor in holding it to be a threat to national security. Zana v Turkey REF. Similarly, Purcell and Others v Ireland, Decision on Admissibility, (Application No 15404/89) 16 April 1991

72 Incal V Turkey, no 22678/93

73 Gündüz v. Turkey, No. 35071/97, 4 December 2003.

74 Gerger v. Turkey [GC], no. 24919/94, 8 July 1999, para.50.; Şener v. Turkey, No. 26680/95, 18 July 2000.

75 ECHR, Belek and Velioglu v Turkey, Application no, 44227/04) 6 October 2015; Gözel and Özer v. Turkey, Nos 43453/04 and 31098/05, 6 July2010.

76 Report by Thomas Hammarberg, CommDH(2012)2, para.70; Memorandum by Nils Muižnieks (no.55)

77 Erkizia Almandoz v. Spain, app. no. 5869/17 (2021) // 44-50.

78 See for example International Physicians for the Prevention of Nuclear War (IPPNW) Report at https://www.ippnw.de/commonFiles/bilder/Frieden/2022_IPPNW_Report_on_possible_Turkish_CWC_violations_in_Northern_Iraq.pdf ; Airwars at https://airwars.org/civilian-casualties/ti070-september-4-2021/ ; Christian Peacemaker Teams; University of Munich's Institute of Forensic Medicine analysis of 1999 attack (original analysis unavailable but corroborated by page 5 of IPPNW Report)

79 UNHRC General Comment 34; Wille v. Liechtenstein, App. No. 28396/95, para. 61; Kula v. Turkey, App. No. 20233/06, para. 47.

80 Güçlü v. Turkey (app no. 27690/03), 10 February 2009 paras 33-42.

81 Sener v. Turkey, para.41; Jersild v. Denmark (No. 15890/89), 23 September 1994, para. 31.

82 Gündüz v. Turkey, no. 35071/97, //43-44.

83 Féret V Belgium, no. 15615/07

84 Taşdemir v Turkey (app. no. 38841/07), 2010.

85 IPPNW, "Is Turkey violating the Chemical Weapons Convention?" 2022.

86 Ilgar Mammadov v Azerbaijan, App. No. 15172/13, 22 May 2014, para. 142.

87 Merabishvili v. Georgia [GC], App. No. 72508/13, 28 Nov. 2017, para. 291 and 309.

88 Ibid para. 162.

89 ECtHR, Selahattin Demirtaş v. Turkey (No. 2),(n22); Rasul Jafarov v Azerbaijan, 69981/14, 17 March 2016, paras. 159-162; Aliyev v Azerbaijan, (n34), paras. 206-2

90 Kavala v Turkey para. 232

91 Article 18 of the ECHR provides "Limitation on use of restrictions on rights "The

restrictions permitted under [the] Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed."

92 See e.g., Antovic and Mirkovic v. Montenegro, app. no. 70838/13 (2017) / 42. C. v. Belgium, app. no. 21794/93 (1996) / 25.

93 C. v. Belgium, App. No. 21794/93, 7 Aug 1996, para 25. See also Niemietz v. Germany, App No 13710/88, 16 Dec 1992, para. 29. The Court also recognized the right to a "private social life" in FNASS and Others v. France, App Nos. 48151/11 and 77769/13, 18 Jan 2018, para. 153. "it is in the course of their working lives that the majority of people have a significant, if not the greatest, opportunity to develop relationships with the outside world."; Bărbulescu v. Romania, App No. 61496/08, 5 Sept 2017, para. 71; Niemietz v. Germany, App. No. 13710/88, 16 Dec 1992, para. 29.

94 See eg, Fernández Martínez v. Spain, App No. 56030/07, 12 Jun 2014, para. 126; A.-M.V. v. Finland, App No. 53251/13, 23 Mar 2017, para. 76; ECommHR, Brüggemann and Scheuten v. Germany, App. No. 6959/75, 12 Jul 1977, para. 55.

95 Niemietz v. Germany, 1992, para. 29.

96 Art. 15(3) International Covenant on Economic Social and Cultural Rights (ICESCR) and Article 13(2) Charter of Fundamental Rights of the European Union (EU Charter).

97 On academic expression under Article 10 see: eg. Sorguc v Turkey, App. No. 17089/03, 23 Jun 2009; Mustafa Erdoğan v. Turkey, App. No. 346/04 and 39779/04, 27 May 2014; Hasan Yazıcı v. Turkey, App No. 40877/07, 15 Apr 2014; on denying entry to academics Cox v. Turkey, App. No. 2933/03, 20 May 2010.

98 IACHR, Ricardo Israel Zipper v Chile, 10 Nov 2009, http://cidh.oas.org/annualrep/2009sp/Chile12470.sp.htm. See also AfCHPR, Good v. Republic of Botswana, Comm. No. 313/05, 26 May 2010, paras. 196–200.

99 E.g. Rec- CM/Rec(2012)7 of the Council of Europe (CoE) Committee of Ministers (COM) on the responsibility of public authorities for academic freedom and institutional autonomy, 20 June 2012; PACE Rec. 1762 (2006) on Academic freedom and university autonomy, 26 September 2007; Magna Charta Universitatum, 18 September 1988; Declaration on Academic Freedom and Autonomy of Institutions of Higher Education ("Lima Declaration"), 10 September 1988; UNESCO Rec. concerning the Status of Higher-Education Teaching Personnel, 11 November 1997; European Parliament Rec. on Defence of Academic Freedom in the European Union's (EU) external action (2018/2117(INI)), 29 November 2018; UNESCO World Declaration on Higher Education for the 21st Century: Vision and Action, 9 October 1998; UNESCO Rec. on Science and Scientific Researchers 2017; IACHR, InterAmerican Principles on Academic Freedom and University Autonomy ("Inter-American Principles").

100 Art. 13 (2) of the Charter of Fundamental Rights of the European Union, 26 October 2012; CJEU, C-66/18, Commission v Hungary, Judgment of 6 October 2020, at para. 225: "that freedom is not restricted to academic or scientific research, but that it also extends to academics' freedom to express freely their views and opinions".

101 Article 27 of the Turkish Constitution. On non-application, concerns see e.g. Scholars at Risk's Submission to the Third Cycle of Universal Periodic Review of Turkey 35th Session of the United Nations Human Rights Council to be held in January 2020; Ayse Çaglar, 'Blow by Blow: The Assault on Academic Freedom

102 Aksu v. Turkey, 2012, para 71; see also Mustafa Erdoğan v. Turkey, 2014, para. 40; Inter-American Principles, Preamble; UN Special Rapporteur on Freedom of Expression, 2020, paras. 16 and 24.

103 European Parliament Committee on Foreign Affairs, Report on the 2018 Commission Report on Turkey, 26 Feb. 2019, p. 8. para. 9, http://www.europarl.europa.eu/doceo/document/A-8-2019-0091_EN.pdf; the Commissioner for Human Rights of the Council of Europe, Third Party Intervention in Mehmet Osman Kavala v. Turkey 20 Dec. 2018, paras. 5-17, https://rm.coe.int/third-party-intervention-before-the-european-court-of-human-rights-cas/1680906e27.

104 European Union Agency for Fundamental Rights, Challenges facing civil society organisations working on human rights in the EU, January 2018, p. 8 and 49.

105 The Commissioner for Human Rights of the Council of Europe, Thomas Hammarberg, Report on administration of justice in Turkey, CommDH(2012)2 p.9; and 5 years later: Nils Muižnieks, the Commissioner for Human Rights of the Council of Europe, Memorandum on freedom of expression and media freedom in Turkey, CommDH(2017)5, para.46; see also UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (UN Special Rapporteur on terrorism), E/CN.4/2006/98, para. 14; CoE European Commission for Democracy Through Law (Venice Commission), Opinion on Articles 216, 299, 301 and 314 of the Penal Code of Turkey, CDL-AD(2016)002, 11-12 Mar. 2016.The Commissioner for Human Rights of the Council of Europe, CommDH(2017)5, Section II.

106 United Nations General Assembly, Report of the Special Rapporteur on the Promotion and Protection of the right to freedom of opinion and expression on his mission to Turkey, A/HRC/35/22/Add.3 2017, para 7.

107 Sdruženi Jihočeské Matky v. Czech Republic, App. No. 19101/03, 10 July 2006; Társaság a Szabadságjogokért v. Hungary, App. 37374/05, 14 April 2009; Magyar Helsinki Bizottság v. Hungary [GC], App. 18030/11, 8 Nov. 2016

108 Aliyev v Azerbaijan, (n34), paras. 213, 223.

109 Ibid., paras. 226.
110 United Nations General Assembly [on the report of the Third Committee (A/53/625/Add.2)] 53/144, Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms
111 PACE Resolution, Resolution 2225 (n24)(2018).
112 CoE Committee of Ministers, Declaration of the Committee of Ministers on CoE action to improve the protection of human rights defenders and promote their activities, 6 February 2008, Article 2
113 OSCE Guidelines , (n33), para. 23.
114 Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, UN Doc. A/RES/53/144 (8 March 1999).
115 Ibid. art. 1.
116 Ibid. art. 8.
117 Ibid. art. 9(3)(a).
118 Ibid. art. 12(3).
119 E.g., Hugh Jordan v. United Kingdom, app. no. 24746/94 (2001) /105.
120 See ibid.
121 See Öcalan v. Turkey, app. no. 46221/99 (2005) / 140.
122 International Association of Prosecutors, Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors (1999) / 4.1(d), available at: https://www.icj.org/wp-content/uploads/2014/03/IAP-Standards-of-professional-responsibility-duties-rights-prosecutors-instruments-1999-eng.pdf

Kurdish Press Under Judicial Pressure

Interview with Lawyer Resul Temur

Background

As PEN Norway, we spoke with Lawyer Resul Temur, who represents Kurdish journalists and media organisations, about freedom of expression in Turkey, the oppression and discrimination faced by Kurdish media workers, and the right to defence in Kurdish. Temur continues to serve as defence lawyer in several cases monitored by PEN Norway, including those involving journalist Dicle Müftüoğlu, the trial of 20 journalists in Diyarbakır, and the Abdurrahman Gök case.

> In Turkey, any attempt by Kurds to engage in civic life is met with the state's expectation that they first relinquish their Kurdish identity and any associated demands.

Could you briefly introduce yourself to us?

As a graduate of Marmara University Faculty of Law, I have been working as an independent lawyer registered with the Diyarbakır Bar Association for 14 years, handling political criminal cases and cases involving Kurdish media workers.

We understand that the majority of your clients are from Kurdish media organisations and Kurdish press workers and journalists. Was this a choice? Why did you decide to specialize in press freedom and freedom of expression?

My career began in Diyarbakır province. A few months into my career, I began handling a case referred to me by a friend from the Kurdish press. He then asked if I would take on the role of the legal counsel for the newspaper Azadiya Welat, where he was employed. I accepted with great honour. As I handled the legal affairs of the Azadiya Welat newspaper, my dedication and working style caught the attention of other Kurdish press workers. They approached me with offers to manage the legal files of their media organisations and the journalists affiliated with them. In this way, I started to work as a lawyer for Kurdish press institutions and Kurdish journalists in various provinces, with Diyarbakır as the centre. I am really honoured to manage the legal cases of Kurdish journalists.

Can you explain the current situation of Kurdish media organisations and journalists? There seems to be an impression that Kurdish journalists in Turkey face more judicial harassment compared to their other colleagues. What are your thoughts on this?

The journalists I defend are systematically investigated on charges of membership of an illegal organisation due to their

Kurdish identity and many journalists are punished for this reason. In Turkey, any attempt by Kurds to engage in civic life is met with the state's expectation that they first relinquish their Kurdish identity and any associated demands. Provided that you relinquish your demands and identity, you are allowed to exist as a state-sponsored Kurd. The Kurdish press refuses to comply with this enforced identity erasure. Because they persist in following the principles of "free press" rather than of embedded journalism, their journalistic work is systematically criminalized, and they frequently face accusations of "not being actual journalists but persons engaging in organisational activities." Because they write and follow news and developments in their own societies, they face the allegation that they are serving the organisation of the Kurdistan Workers' Party (PKK). The language media workers use in their news reports, their editorial preferences, the Kurdish politicians they interview, the agencies and newspapers they work for, and even the communication between journalists themselves can be grounds for accusations.

What are the common accusations faced by Kurdish journalists? Can you give examples? Press and media organisations are also complaining about financial pressures. Can we get your views on this as well?

The most common accusations we come across are accusations of membership of an illegal organisation on the grounds of their identity, and trials based on the allegation of disseminating propaganda in favour of an illegal organisation because of the language they use in their news reports. For example, publishing/reporting a press statement made by MPs on solitary confinement in İmralı Prison, or even using Öcalan's[1] poster in the visual of a news article can be grounds for punishment.

Recently, 8 journalists working for the Kurdish press in Ankara province were sentenced to 6 years and 3 months in prison on the basis of an anonymous witness statement. In their testimony, the anonymous witness claimed that journalists working for the Mesopotamia and Jin News agencies were acting on behalf of the PKK, without referring to a single incident or providing any concrete evidence. In fact, during the hearing of the anonymous witness, a lawyer colleague asked this witness whether they were working on behalf of the State. And the anonymous witness stated that he was working on behalf of the State. The presiding judge repeated the same question to the anonymous witness, who confirmed with a "yes."

By juxtaposing the abstract statements of the anonymous witness with the news published in the agencies the journalists have been working for, they hoped to justify the statements of the anonymous witness. Nonetheless, the only target of their penalties was the media platform where the journalists were employed, and essentially, the act of journalism itself.

More recently, a striking revelation came during the trial of journalist Sofya Alağaş in January 2025. Alağaş faced charges for 104 news articles published by Jin News agency, where she was the former owner and responsible editor-in-chief, and was sentenced based on these articles on grounds of an alleged membership in an illegal organisation. In fact, during the episode when Sofya Alağaş owned the agency, a total of 144,605 news items had been published.

Do you also have clients who are authors whose books have been seized? How do you assess the situation of book seizures and bans in Turkey?

I am also the lawyer of Aram Publishing, a Diyarbakır-based publishing company. As far as we have been able to determine so far, confiscation orders have been issued for 144 books from the publishing house. We have appealed to the Constitutional Court for most of these, but not a single appeal has been concluded since 2016. Bans on books are issued in the form of bans on their sale and distribution and of confiscation orders under Article 25 of the Press Law. Generally, recall orders are issued on the grounds that the books promote organisational propaganda. However, none of the judgements specifies which parts of the book promote such a propaganda. There is no specifically designated court responsible for ruling bans on books. Therefore, upon the request of the prosecutor of any province or district, the criminal judgeship of peace can issue a ban without any investigation. However, the Press Law stipulates that a decision to ban a book can only be taken within the scope of an investigation into the book. Moreover, as there are no limitations

regarding the period of prescription, they can rule a ban on a book even years after it has been published. However, once the books leave the printing house, a copy is dispatched to the press prosecutor's office in the area where the printing house is situated. Nevertheless, since there are no limits on the date of publication or the authority of the courts, anyone can ban any book at any time and place.

We also want to ask about whether your clients can defend themselves in Kurdish during the investigation and prosecution phases. What is the situation of Kurdish in the courtroom?

Kurdish has been the preferred language of defence for journalists working in the Kurdish press and journalists on pre-trial detention in political cases. In fact, this serves both as a declaration of their identity and a form of resistance. In certain journalist trials, defences are presented in Turkish to ensure that international visitors who attend the hearings for support and solidarity could comprehend the journalism defence in court. One of the main problems with the defence in Kurdish is that some courts limit the right to defend in Kurdish only to the first and last hearing. Another issue is that if the defendant is sentenced at the end of the proceedings, they are expected to pay the interpreter's fee. This situation effectively penalizes the decision to defend oneself in their native language. The quality of translations is a problem too.

We know that you have faced various criminal investigations from time to time. Could you elaborate on these? We remember you were detained along with your clients at one point. Do these situations not affect you and the journalists you defend?

Most recently, I was detained in 2023 on the basis of the statement of a witness whom I did not recognise at all and whom I was sure did not recognise me either. The main allegation was that I was handling the cases of journalists on behalf of the organisation. In the early hours of the morning, both my house and my law office were raided and searched. All my case files in the office, my computer, my mobile phone and all our digital belongings at home were seized. After 4 days of detention, I was released with a mandatory reporting duty and a ban on leaving the country. The day after my release, when I got back to the office, I found myself without any documents, devices, or materials needed to handle my cases. This negatively affected both me and the people I have been defending About 15 of my clients were detained with me within the scope of the same operation. Since I was a suspect in the same case, I was not able to handle the files of journalists and my other clients for a long time. In other words, I was unable to practice my profession, and simultaneously, my clients' right to defence was effectively restricted. Subsequently, when their files were separated and individual cases opened, I was able to once again represent them as their lawyer.

Many indictments we have worked on within the Turkey Indictment Project have been reviewed by our colleagues from different countries in Europe, like the ongoing mass journalist trial in Diyarbakir and Dicle Müftüoğlu. And we know that you have been working on those cases as a defence lawyer. Do these indictment reports contribute to the protection of journalists' rights and your professional activity?

In political trials in Turkey, there is a recurring pattern. The similar accusations presented each time lead to defences that also become similar to one another. As a result, this situation fosters an environment where the courts further disregard the lawyers, whom they already tend to overlook. At this point, the expert opinions from the PEN Norway Turkey Indictment Project guide the court's attention back to the defence lawyer. In this context, the expert opinion and the defence are becoming noteworthy. Being continuously engaged in the same trials, we risk taking certain unlawful acts for granted. In this context, the indictment project gives you the perspective of legal professionals who have not become desensitized to such trials and thus lets you question even the minute unlawful procedures that have become routine. In this sense, we find it very valuable to see a different perspective supporting our efforts. Unfortunately, because the courts rarely address the lawyers' defences in their reasoned judgments, they also fail to address their evaluations regarding the indictments in those judgments. What is important, however, is both that we, as lawyers, draw strength from different perspectives and that the journalists on trial feel stronger thanks the support offered to their defence. Naturally, we care about the outcome of the

trials, but we also care about maintaining our stance in defence as much as the outcome of the trial. The analyses prepared as part of the indictment project strengthen our stance.

What do you think about the quality of indictments in Turkey? Do you or your clients face difficulties in building a defence due to the indictments? What do you think is the biggest problem with the indictments?

Prosecutors in Turkey are less concerned about the legal role they should be playing. For this reason, they serve the demands of law enforcement rather than clarifying an incident. For example, although Article 160 of the Criminal Procedure Code stipulates that prosecutors have the authority to collect both exculpatory and inculpatory evidence, we have yet to come across any prosecutor who collected exculpatory evidence or made a favourable comment regarding the Kurdish journalists or those being investigated politically. This situation results in the police investigation report, a summary of the case file as drafted by the law enforcement, being directly converted into an indictment. At times, indictments span hundreds of pages, yet the section related to the client is merely one or two pages placed at the very end of the document. The rest is often a history of the organisation that the prosecutor simply copied and pasted into the indictment without even reading it themselves. This makes the indictment vague and incomprehensible. However, a defence is built on specific, clear and unambiguous allegations. Such vague and repetitive indictments also blur the boundaries of the defence.

Do you have any message you would like to give to the PEN Norway family and the international community?

The primary aim of political trials in Turkey is to gag the individual on trial, stopping them from voicing their thoughts or opinions entirely. Those on trial often respond by highlighting the identity they associate with and by showcasing the absurdity of the trial they are undergoing. In such trials, one of the developments that empower those who are unjustly accused is to be able to be heard and seen from the outside. In this context, PEN Norway and similar national and international organisations and individuals who monitor these proceedings help bring visibility to these trials conducted behind closed doors. I believe that such an act of solidarity is crucial because it empowers those who have been wronged. For this reason, I would like to reiterate that we highly value your work, including your work as a court observer. We find it very valuable that you provide a different perspective to both us and the case, particularly through your legal opinions.

Endnotes

1 PEN Norway's note: Abdullah Öcalan is the recognised political and ideaological leader of the Kurdistan Workers' Party (PKK) who was abducted by Turkey's intelligence forces in 1999 and has been imprisoned ever since on the prison island Imralı. Abdullah Öcalan's family visits were completely cut off as of March 2020. After 43 weeks, Ömer Öcalan, a member of Öcalan's family, visited Öcalan on 24.10.2024. Then, in 2025, following a speech by the leader of the Nationalist Movement Party in parliament, it was announced that a peace process had begun again in Turkey. On 27 February 2025, a statement written by Öcalan from prison was made public through a visiting delegation and Öcalan emphasised the need for peace and called on the Kurdistan Workers' Party to lay down arms and dissolve itself.

PEN NORWAY

Legal Report on Indictment: **18 Kurdish Journalists**

Şerife Ceren Uysal

18 Kurdish journalists were charged with PKK membership based on the news reports they produced for various news agencies and were held in pretrial detention for an extended period. During the proceedings, the number of defendant journalists increased to 20. The trial is still ongoing.

Legal Report on Indictment:

18 Kurdish Journalists

Author: Şerife Ceren Uysal

1. Introduction:

This study focuses on the 728-page indictment with the investigation no. 2022/3879 and indictment no. 2023/928 issued by Ahmet Şahin, the Public Prosecutor of Diyarbakır on 24.03.2023 against 18 Kurdish press workers.

2. Summary of Case Background Information:

The legal process leading to the indictment began with a police raid on the residences of 21 press workers on 8 June 2022. In addition to their residences, media organs such as Pel Yapım, Piya Yapım, Ari Yapım and head office of Jin News in Yenişehir district were also raided. Many items of equipment and digital materials were seized during the raids. Items belonging to journalists such as video cameras, digital cameras and external memory sticks were labelled as "materials that belonged to the terrorist organisation" and displayed under the banner of the Counter-Terrorism Unit of the Diyarbakır Police Headquarters. Under an extended period of detention, the journalists were kept in Diyarbakır Police Headquarters for 8 days. At the end of which a pre-trial detention was imposed on all 15 journalists.

The indictment was issued 9 months after the operation and for 9 months the imprisoned journalists remained unaware of the charges filed against them and the evidence supporting those charges. In July 2023, 13 months after their arrest, the journalists were released on bail following the first hearing.

This is an ongoing trial that PEN Norway is following.[1] The trial in question has been characterized by multiple human rights violations from the outset of the investigation phase and we hope that an analysis of its indictment within the framework of domestic and international human rights laws will be a valuable archival resource for uncovering the escalating repressive patterns in Turkey particularly in relation to the Kurdish press.

3. Analysis of the Indictment:

Summarizing a 728-page indictment poses various challenges. As will be explained below, those challenges are primarily due to the extensive detail and repetitive content in the indictment, which is not directly relevant to the accusation, the suspect, or the act in question. Because the nature of the indictment necessitates sifting through a heap of extraneous information to discern the specific accusations and to be able to make a defence. Even based on this first observation, it can be argued that the indictment contains some extraneous content which obstructs the effective exercise of the right of defence.

As is typical in indictments involving a large number of suspects, the indictment includes personal identification information of the suspects until the beginning of page seven. This section contains the information that is typically found in an indictment issued under Article 170/3 of the Criminal Procedure Code (CPC).

The heading "Evidence" covers all suspects, and the following sub-headings are given here:

> 1-Image Detection, 2-Suspect Statement, 3-Face Recognition System Report, 4-Investigation Documents[2], 5-Criminal Record Report and Full Contents of the Case File

This part of the indictment accuses all the defendants of being members of a terrorist organisation under the Turkish Penal Code (TPC Art. 314/2) and Anti-Terrorism Law (TMK Art. 5/1) based on the same applicable articles.

On page 7 of the indictment, the section that follows the personal identification details of the suspects was labelled as 'INDEX' by the prosecution. This 7-page section serves as a 'table of contents' for the indictment.

Considering the length of the indictment, this section can be said to be useful. Because it makes it easier for the researcher to understand which section of the indictment contains the evaluations between the suspects, evidence and the acts.

The first part of the indictment provides a summary of the organisation of which the journalists are alleged to be members; the second part of the indictment is entitled "The Beginning of the Investigation and the Investigation on the Companies". The second part lengthily describes the media structure of the organisation and proceeds to examine the partnership structure of Sterk TV and Medya Haber TV, their funding sources and the contents of the programmes the news channels broadcast. This section suggests that the Prosecutor marked certain content broadcast by the relevant channels as "content linked with the organisation".

The section on the evidence attributed to the suspects, however, starts after page 346 of the indictment. The Prosecutor's effort to establish a relationship between the suspects and the case only begins halfway through the indictment.

As of page 684, the evidence previously listed for each suspect is now evaluated individually. It is possible to say that the indictment formally fulfils the requirements of Article 170 of the CPC but as explained below, a legal review shows that its statements are biased and legally questionable. It should be noted, however, that due to its content and the reasoning behind it, the indictment disregards Articles 160 and 170 of the CPC in many aspects.

3.1 The Analysis of the Indictment (and the Investigation) within the Scope of CPC Article 160:

Turkey's Criminal Code of Procedure's (CPC) Article 160 prescribes the duties of the public prosecutor. According to the law, as soon as the public prosecutor is informed of a fact that creates an impression that a crime has been committed, either through a report of crime or any other way, she or he shall investigate the factual truth, in order to make a decision on whether to file public charges or not. This means, first of all, that there must be an initial suspicion in order to proceed with an investigation.

An examination of the indictment against 18 Kurdish journalists, however, shows that the Prosecutor of the investigation has no grounds for any suspicion other than the assumption that "*Kurdish journalists who create content for Kurdish news agencies are indiscriminately members of the organisation*".

Under the title "companies subject to the investigation", the Prosecutor states that "the companies Pel Yapım Production, Ari Yapım Production and Piya Yapım Production create content for STERK TV and MEDYA HABER broadcasting organs that are aligned with the organisation." And based on

the assumption that the aforementioned companies and media organs are "the organs" of the terrorist organisation, an inference is made that journalists working or creating content for these media organs are terrorists. As regards those companies, the indictment mentions certain issues that could be the subject of labour law or commercial law but it merely superficially touches the issues concerning criminal law. As far as can be understood from the indictment text, all these assumptions of the Prosecutor could only be based on the statements made by anonymous or named witnesses who were "invited" to testify by the Anti-Terror Units one after the other. It is only these witnesses, heard every other day, who speak of the organisation's relationship with Company A or accuse a journalist of membership. However, it is important to note that the statements of those anonymous witnesses were taken after the investigation had begun. In other words, those statements cannot technically be the source of the initial suspicion as defined in Article 160 of the CPC. Given that there are no links between the suspects in the case and the organisation beyond the statements made by these witnesses, there seems to be no reasonable basis for launching an investigation against journalists prior to obtaining the statements from these witnesses. Most of these witness statements were taken in December 2022, but the police operation that resulted in the journalists' pre-trial detention had taken place in June 2022. In short, it is possible to claim that in issuing the indictment, the investigating prosecutor preferred to proceed from the suspect to the evidence rather than the other way around.

> "An examination of the indictment against 18 Kurdish journalists, however, shows that the Prosecutor of the investigation has no grounds for any suspicion other than the assumption that "Kurdish journalists who create content for Kurdish news agencies are indiscriminately members of the organisation".

3.2 The Analysis of the Indictment within the Scope of CPC Article 170/1:

In the reports prepared as part of the PEN Norway Turkey Indictment Project, it was not generally considered necessary to provide an analysis in relation with the Article 170/1 of the CPC. Article 170/1 of the CPC stipulates that "The duty to file a public prosecution rests with the public prosecutor." In other words, an indictment filed with the signature of the prosecutor will, in principle, be deemed to have complied with Article 170/1 of the CPC. An important detail in this indictment, however, has made it necessary to conduct a dedicated assessment under Article 170/1 of the CPC. When describing the operations carried out within the scope of the investigation, the indictment says "our Directorate of Counter-Terrorism Unit" 51 times and "our directorate" 10 times. For example:

- **Indictment, p. 210:** *"The assessment shows that; ... the archive records of our directorate have two entries about the person in question..."*

Nonetheless, had it been prosecutor's own words, the sentence would need to be structured as follows:

- *"The assessment shows that; ... the archive records of the Directorate of Counter-Terrorism of Diyarbakır Police Headquarters have two entries about the person in question..."*

In a total of 61 passages in the indictment, there are sentences

that clearly and indisputably demonstrate that the "identification and assessment" in question belonged to the relevant Directorate of Counter-Terrorism Unit. Furthermore, none of these sentences were cited; instead, they were all integrated into the body of the indictment. For example:

- **Indictment, p. 351:** *(The following sentence is under the heading "statements in which the suspect's name is mentioned.") "(...) when Hamit AKBAL, who declared that he worked at the workplace in question, was summoned to our Directorate of Counter-Terrorism Unit with the aim of obtaining detailed information;"*

- **Indictment, p. 490:** *"it was understood that the person did not have a UYAP record and that there was no judicial investigation conducted by the directorate of our unit,"*

In short, it can be established beyond any doubt that many sections of the indictment were copied and pasted directly from the police reports and that the basis of the indictment is the police report prepared by the Directorate of Counter-Terrorism Unit. Thus, it is important to highlight that the indictment only meets the formal requirements of Article 170/1 of the CPC, raising significant doubts about whether it was prepared by the Prosecutor personally.

3.3 The Analysis of the Indictment within the Context of CPC Article 170/4:

An assessment in the context of Article 170/4 of the CPC makes it clear once again that the indictment was copied and pasted from the police report prepared by the Police Headquarters. As is known, as a result of a recent amendment to the CPC, it is now a rule that information unrelated to the events forming the basis of the alleged crime and to the evidence pertaining to that crime cannot be incorporated into the indictment. Nonetheless, the entire indictment displays a profound lack of awareness regarding this regulation. The indictment consists of hundreds of pages of information, including descriptions of the organisation, content claimed to be intra-organisational communication that does not reference the suspects, business records from trade registries, and detailed accounts of individuals who are not even involved in the case. What is striking about this is that it shows a lack of adherence to Article 170/4 of the CPC which was specifically designed to tackle the persistent habit of drafting indictments in this manner in Turkey.

3.4 Violations of the Presumption of Innocence and the Right to Respect for Private Life:

In the context of Article 170/4 of the CPC, a noteworthy point in the indictment needs to be addressed separately. The indictment names another journalist, who is not a suspect in this investigation, a total of 30 times, providing their full identity details. In accordance with the presumption of innocence and the principle of respecting private life, the journalist's name will not be disclosed in this report.

The indictment not only disclosed the identity, private life, and professional activities of this journalist, but they are also repeatedly referred to as a suspect 30 times. A fact that once again reinforces the feeling that one is reading a police report rather than an indictment.

This could have been considered a material error, had the indictment not mentioned the name of the journalist concerned a total of 30 times and had they not been referred to as a suspect each time. It points to a problem that goes far beyond a material error, however, since the indictment persistently violates the rights of a journalist, who is outside the scope of the investigation, including his right to private life and to enjoy the presumption of innocence, both of which are protected by the European Convention on Human Rights and the Constitution of the Republic of Turkey. Pursuant to Article 160 and other articles of the CPC, the authority to conduct a criminal investigation is exclusively vested in the public prosecutor. Therefore it's noteworthy that the investigation in question is permitted to be put entirely under the direction of the law enforcement authorities, and in some cases, to be conducted by law enforcement personnel themselves. In this context, it's crucial to underline that not only was CPC Article 170/4 not adhered to, but the rights protected by the ECHR and the Constitution were also flagrantly violated in the case of another journalist who was not part of the investigation.

3.5 Does the Indictment Establish Reasonable Doubt in Accordance with Article 170/2 of the CPC?

Page 346 of the indictment is titled "Offences and Acts the Suspects are Charged with". For each suspect, identical subtitles are introduced, and nearly identical conclusions are drawn. There are certain differences in the evidence and assessments of press workers who perform professions such as cameramen and press workers who create content for the programmes. This report analyses only the cases of first two suspected journalists in the indictment. The suspect Abdurrahman Öncü is a cameraman. The other suspect Aziz Oruç is the presenter of a programme called Sokağın Sesi (The Voice of the Streets). Our assessment of whether the indictment has considered the element of "reasonable doubt" will be based on the evidence and findings the indictment presents concerning these two press workers.

Firstly, the indictment analyses the insurance records of Abdurrahman Öncü and identifies his employment records in the companies in question. These companies were established under Turkish law and currently have active records. However, the prosecutor considers even employment as a cameraman within these companies, let alone involvement in creating news content, as evidence of his membership in the organisation. The indictment found no company registration for the other suspect, Aziz Oruç.

Following that, the indictment contains a very interesting sentence regarding Öncü: *"The police search conducted in the production companies found no evidence that directly mentioned the name of the suspect, but the suspect was involved in all the content produced in the production agencies due to his activities as a cameraman..."* A simplified version of the sentence would give a better idea about the intended meaning: "Being a cameraman in this company is considered an offence, even if no evidence related to the suspect is found." It is absurd to label individuals working for a company as members of a terrorist organisation if that company is established in accordance with a country's laws, and if there is no court ruling designating it as an affiliate of that terrorist organisation. Furthermore, accusing a person in such a manner for an act not classified as an offence in the Turkish Penal Code or in any other domestic legislation is, in straightforward terms, a clear violation of the principle of legality.

In the section of the indictment dedicated to evidence assessment, there are certain findings that should be considered in favour of both suspects. For example, in Öncü's case, the indictment clearly states that "[the investigation] found no direct instruction sent directly to the suspect from the unit that the organisation claimed to be its press centre, the suspect's name was not mentioned in any instruction or report, no organisational action or activity in which the suspect participated and no statement of the suspect containing an element of crime were found". It also states that no criminal elements were found in electronic devices such as hard discs and laptops seized during the search of the suspect's house, but that the content of some photographs or videos "may contain criminal elements". Finally, the indictment states that an open-source search was conducted about the suspect which yielded no findings of a criminal offence.

As regards Aziz Oruç, the indictment states that "there are no wiretap recordings, no criminal elements found in the open archive search, and there is no document or information about him in the searches conducted in the companies". This being the case, it becomes even more essential to scrutinise the legal grounds for Oruç and Öncü's more than a year-long detention and their ongoing trial, as well as the "evidence" that resulted in their being accused of belonging to an illegal organisation. Because it is obvious that the prosecutor did not consider the exculpatory evidence as required by Article 170/5 of the CPC but based his assessment merely on the evidence he thought was inculpatory.

A review of the inculpatory evidence in the case of Öncü shows that the indictment refers to two telephone conversation records of the suspect. The transcriptions of those conversations reveal that one of them is about uploading the recordings of a programme to a server and the other whether a required article has been written. In other words, both conversations fall directly within the realm of journalistic activities and do not include any additional commentary. In short, the content of these conversations, which are typical in a professional context, should be viewed in

favour of Öncü. However, they have been presented as inculpatory evidence in the indictment.

Other inculpatory evidence against Öncü consists of statements of two former employees of the company and an anonymous witness, who apparently visited the Directorate of Counter-Terrorism Unit one day apart and mentioned Öncü's name, and of occasional phone calls between Öncü and other suspects in the file. In Öncü's case, this is all the evidence about a person who was under pre-trial detention until the first hearing. The prosecutor failed to prove that Öncü had received instructions from the organisation, to reveal any statement, telephone conversation or public action that contained an element of crime, nor did he find any evidence in Öncü's residence to prove his links to the organisation.

To summarise, the "evidence" that raised enough suspicion for the investigating prosecutor to issue an indictment accusing Öncü for being a member of an illegal organisation and requesting his pre-trial detention from the court consists of the following:

- Witness statements saying, "*The company is owned by the organisation and that person was a cameraman there,*"

- Telephone conversations of Öncü with his colleagues.

In the case of Aziz Oruç, the indictment completely overlooks the exculpatory evidence and instead dedicates pages to a content analysis of street interviews focusing Oruç's questions and the corresponding answers. A review of Oruç's statements to the Prosecutor's Office shows that all of the questions asked to him were related to his street interviews or to his written interviews published by the Mezapotamya News Agency.

While in Öncü's case, the prosecutor proceeded with the assumption that "the employees of Company X are terrorists," in Oruç's case his conclusion was based on the assumption that "Oruç conducted these interviews under the instructions of the organisation".

The criminal offence of membership of a terrorist organisation under Article 314 of the TPC is an offence that has been the subject of frequent ECtHR and Constitutional Court reviews, Venice Commission reports and the Court of Cassation decisions. Therefore, upon reviewing these pieces of evidence consecutively any legal expert will immediately conclude that there is no basis to accuse the journalists in question of membership of an organisation. However, the indictment came to a very different conclusion and both journalists were held in pre-trial detention for more than a year.

The indictment's assessment of the evidence summarised here begins on page 691. The -so to speak- crucial sentence in the indictment's assessment of Öncü is as follows:

> *"(...) [it is concluded that] the suspect also works in the same workplace, so it is contrary to the ordinary course of events that he does not have an idea about this organisation (...)"*

However, the quality of the "organisation" referred to in this sentence is not explained in a manner that is convincing and based on the evidence. Even if it is assumed for a moment that an organisation such as that alleged by the prosecutor does really exist, it becomes evident that in Öncü's case, the prosecutor has completely disregarded the principle of individual criminal responsibility. The prosecutor disregarded that, in order to establish the responsibility of the suspect, he had to prove the facts concerning the suspect. And he relied on a proposition that in a situation where a company is established with the goal of committing an offence, every single person working in that company under an employment contract can be accused of committing the offence in question, a proposition that is -in Prosecutor's own words- contrary to the ordinary course of events.

In the case of Oruç, the indictment's assessments focus mainly on the street interviews conducted by Oruç and it alleges, as stated above, that these interviews were conducted under the instructions of the organisation. The full wording of the sentence in question is as follows:

> *"(...) [it is concluded that] in this context, the presenter of the programme called Sokağın Sesi [The Voice of the Streets] is the suspect Aziz ORUÇ and that the program is produced/shot in the production company, that the format of the programme is conducting street interviews where the suspect conducts interviews with citizens on the street by asking them questions, but as will be explained, both the questions asked and the preferred topics are completely organisation-related in terms of their contents (...)"*

A review of the topics chosen for the street interviews and listed in the indictment with the allegation of organisational content, shows that those topics cover subjects such as the economic crisis, the condition of ill prisoners, linguistic pressures on Kurdish language in the context of February 21st World Mother Language Day, and the nation's cross-border operations.

At this point, it is useful to recall the elements of Article 314 of the TPC: First of all, the elements in the legal definition of the offence must be knowingly and intentionally committed. In other words, it should be noted that this offence cannot be committed without the element of intent. The intent refers to the knowing and intentional commission of the elements in the legal definition of the offence. In this case, the prosecutor must first establish that the journalist knowingly and willingly committed an offensive act. Otherwise, the presence of the element of intent cannot be asserted. In the case of Öncü, it is clear that the element of intent cannot be established with the prosecutor's suggestion that "he has a job with social security benefits and, moreover, if he is a cameraman, he knows what the job is about and wants to do it".

In fact, the Constitutional Court, in paragraph 39 of its judgement dated 18.01.2022 on journalist Cemil Uğur's application, makes it clear why this indictment should not have been written. The Constitutional Court ruled that Cemil Uğur's right to personal liberty and security was violated and the Court put it is as follows:

> *"In the light of the elements in the file, the applicant is essentially accused of taking part in the press structure of the PKK/KCK terrorist organisation and of making news that constitutes a propaganda promoting the organisation. However, the investigation file presented no evidence linking the applicant to the PKK/KCK terrorist organisation. The arrest warrant failed to establish the existence of such a link either. Although the arrest warrant claimed that organisational publications were produced at the agency where the applicant worked, no news attributable to the applicant was mentioned. It cannot be said that the fact of working within such an agency is a robust indicator of guilt regarding a terrorism-related accusation if the content of the news reports produced by the applicant is disregarded. On the other hand, the investigating authorities failed to show any specific findings or information that could suggest that the applicant had reported on the instructions of the PKK terrorist organisation. It is clear that the applicant is an employee of the news agency in Van and cannot be held responsible for all the news reported by the agency."*[3]

4. Conclusion and Recommendations:

As it is, the indictment's character can be summarised as follows:

- The indictment violated the right to respect for the private life of a journalist who was not among the suspects and was written in violation of the presumption of innocence.
- The indictment ignored and excluded tens of pieces of exculpatory evidence in relation to the suspects.
- The indictment does not contain any evidence that establishes even the minimal link between the suspects and the organisation.
- A number of findings indicate that a significant portion of the indictment has been directly copied and pasted from the law enforcement reports.

- The main argument of the indictment in the case of certain suspects is that employment in agencies and firms assumed to have affiliations with the organisation is enough to raise a substantial suspicion of being a member of the organisation. In the case of journalists who directly produced programmes or reported news, the indictment deemed it sufficient to assume that they acted on the instructions from the organisation.

It is clear that the above list should be read and reread with certain other facts in mind, such as: 1) The journalists identified as suspects in this indictment have been in pre-trial detention for more than a year. 2) Every year in Turkey there are dozens of police operations, detentions and arrests targeting Kurdish media workers employed in similar news agencies. For example, according to Reporters Without Borders' (RSF) data 25 Kurdish journalists were arrested in the first half of 2022.[4]

As the established case law of the ECtHR states, an indictment plays a very important role in the criminal process. Because from the moment the indictment is served, the defendant officially learns the factual and legal basis of the accusations against them in writing.[5] As we have frequently emphasized in the reports prepared as part of this project, it is already inevitable that an indictment failing to meet the requirements of the CPC violates the rights outlined in Article 6 of the ECHR. It should be noted that an incompetent indictment infringes upon many fundamental rights and freedoms, especially the presumption of innocence and the right to defence.

This legal analysis revealed that the main issue with this indictment was the prosecutor's determination to draft it despite the lack of evidence to establish reasonable doubt. What stands out as particularly interesting is that this extensive indictment completely omits the concepts of freedom of expression, freedom of the press and the right to be informed. Again, the prosecutor did not discuss the elements of Article 314/2 of the TPC and not even once in the indictment did he feel the need to refer to the case-law of the Court of Cassation, the Constitutional Court or the judgments of the European Court of Human Rights. In short, the indictment is rich in irrelevant details but falls short in presenting a legal argument. Therefore, the problem is once again the disregard of fundamental rights and freedoms, stemming from a political motivation to punish the suspects without a suspicion supported by evidence.

Prepared by the ECtHR on Article 18 of the ECHR, the Guide on Article 18 defines the concept of "ulterior purpose" as follows:

> *"An ulterior purpose is a purpose which is not prescribed by the relevant provision of the Convention and which is different from that proclaimed by the authorities (or the one which can be reasonably inferred from the context).*
>
> *The notion of ulterior purpose is related to that of "bad faith", but they are not necessarily equivalent in each case."* [6]
>
> *The Court has distanced itself from its previous approach which consisted in applying a general rebuttable assumption that the national authorities of the High Contracting States have acted in good faith and in focusing its scrutiny on proof of bad faith. Instead, it aims at an objective assessment of the presence or absence of an ulterior purpose, and thus of a misuse of power.*

The Guide explains the considerations the Court will give weight to when assessing violations of Article 18 of the ECHR as follows:

> *"In the first place, whether the authorities attached the utmost importance to their actions targeting a specific individual or a group; and whether a given case belongs to an established pattern of misuse of power by the respondent State."*[7]

It is known that the government authorities have persistently refuted the figures released by human rights organisations regarding the number of imprisoned journalists, often using the argument that "they are not journalists" or "they are not in prison for journalism". In a striking

example, Murat Alparslan, a Justice and Development Party member of parliament addressed the Turkish Grand National Assembly during a debate in July 2023, around time when the journalists mentioned in this indictment appeared before the judge for the first time. His remarks strikingly encapsulate the government's stance on the Kurdish press and the media workers. Following his assertion that the TV channels where journalists present and host programs disseminate propaganda for the organisation and legitimise its actions, Alparslan continued with the following remarks:

"In short, no member of the press is imprisoned for doing their duty as such. Many of the people we call 'imprisoned journalists' today were apprehended with machine guns in their backpacks instead of cameras." [8]

It is a well-known fact that Kurdish press, media organs and websites have been shut down many times. A hypothetical research for that single journalist who works for Kurdish media outlets in Turkey but does not have a history of any criminal proceedings would most probably end up revealing the systematic judicial harassment Kurdish press workers are now facing. This consistent pattern of infringing upon freedom of the press, freedom of expression, and the right to be informed has persisted unchanged for decades.

In summary, over the years the judicial practice in Turkey has chosen to legally harass the Kurdish press and Kurdish journalists in a systematic way, primarily with the goal of suppressing Kurdish media, even if it comes at the cost of violating freedom of expression and freedom of the press.

As such, a fundamental observation that has been made in many previous reports is also valid with respect to this indictment: This indictment should never have been issued. The indictment clearly violates the principle of legality, the presumption of innocence, freedom of the press, freedom of expression, the principle of respect for private life and even the right to defence and the right to a fair trial because of its unnecessarily long, scattered narrative and its accusations that appear to have been copied and pasted from a police report.

On the other hand, the prosecutor's determination to overlook exculpatory evidence while simultaneously avoiding a discussion of the elements of the offence indicates that the indictment was crafted regardless of the "conclusion reached in the investigation".

This is the reason why we think any suggestion to improve the indictment with reference to the CPC will fall flat, and such an effort will have to settle for pointing out the "legal ideal" alone. It is clear that there is political motivation to suppress the Kurdish press and media, and as the driving force behind this indictment, this motivation needs to change.

Endnotes

1 PEN Norway's report on the first hearing: PEN Norway observes Kurdish media case - PEN Norway (norskpen.no)

2 The original document contains various typos and errors that are kept intact in the Turkish version of this report.

3 To access the full judgement: Constitutional Court of the Republic of Türkiye

4 Turkey: 25 journalists imprisoned in half a year | RSF

5 ECtHR, Kamasinski vs. Austria, 1989, / 79

6 Guide on Article 18 - Limitation on use of restrictions on rights (coe.int) (paras. 29, 30, 31)

7 Guide on Article 18 - Limitation on use of restrictions on rights (coe.int) (para. 45)

8 Kurdish journalists debate in Parliament: No machine guns found - Yeni Yaşam Newspaper | Yeni Yaşam (yeniyasamgazetesi5.com)

PEN NORWAY

Legal Report on Indictment: **Dicle Müftüoğlu**

Ezio Menzione

Dicle Müftüoğlu is a Kurdish journalist working at Mezopotamya Agency, named Most Resilient Journalist by Free Press Unlimited in 2023. She was prosecuted for PKK membership and leadership based on journalism activities from years she had already been tried for, and was acquitted after a lengthy pretrial detention.

Legal Report on Indictment: Dicle Müftüoğlu

Author: Ezio Menzione

1. Introduction

This study focuses on the indictment with the investigation no. 2023/182342 and indictment no. 2023/5664 issued by Nuri Şahan, the Public Prosecutor of Ankara on 06.09.2023 against the journalist named Dicle Müftüoğlu.

2. Summary of the Case Background Information

Dicle Müftüoğlu (whom we will refer to as DM, for the sake of brevity) was born in 1984 in Doğubayazıt, Ağrı. She has been working as journalist, editor and reporter since 2008, collaborating with different institutions and agencies, some of which were closed via Government decrees. She is currently working for the Kurdish-Turkish news agency Mezopotamya, and in 2023 she was honoured as Most Resilient Journalist by Free Press Unlimited.

DM had been tried for her journalistic activities even before the indictment in question. She was particularly tried in the Diyarbakır 5th High Criminal Court during 2017-2018, and it is understood that she was fined 20,820 TL for committing the act of publishing in a way that legitimizes the coercive, violent, or threatening methods of a terrorist organisation, as per Article 6/4 of the Anti-Terror Law. A decision was made to defer the announcement of the verdict for this penalty. This case is directly related to DM's current trial, as the first charge against her in the related indictment was also membership in a terrorist organisation. In other words, the entire trial was conducted over the membership charge. Subsequently, DM was asked for additional defence, and a verdict was made against her based on TMK Article 6/4. That is, there had already been a trial for membership in a terrorist organisation for the period covered by the indictment being reviewed in 2018.

Dicle's ongoing trial today also has a rather confusing history. because it follows two previous indictments of the same content filed before the Ankara Court: after the court refused to take up the case, it was filed before the Diyarbakır Court. The case also overlaps with another, concerning nineteen people, five of whom were journalists and were arrested in Ankara by court order. DM was one of them, she was arrested on 3 May 2023. The case was finally brought before the Diyarbakir High Court and at the third hearing, in February 2024, she was released with a travel ban whilst the trial continues. The case - or rather, the cases, because their origin is disputed - came to light in June 2022 on one side, and in April 2023 on the other. Throughout this complicated pre-trial history and for the trial she is currently facing, the charges have always been "establishing and managing a terrorist organisation", "membership in a terrorist organisation" and "knowingly and willingly assisting a terrorist organisation" (art. 314/1, 314/2 TPC, as well as art. 58, 63, 54 TPC and art. 3 and 5 of the Turkish Anti-Terrorism Law).

She has always maintained a very calm judicial demeanour, answering all questions posed to her by the police, clarifying all aspects relating to the accusation and linking them exclusively to her profession as a journalist. She broke down only once in front of the court, stating loud and clear that "Journalism is not a crime!." The trial is ongoing, and the next hearing is scheduled for October 2024.[1]

3. Analysis of the Indictment:

The indictment (no. 2023/5664) is an exceptionally long document of 43 pages, signed by the Chief Public Prosecutor's Office of Ankara. The document is almost entirely devoted to describing the internal bodies of the PKK organisation, mainly its cultural and media bodies. This description is repeated three times, for there are three witnesses who were heard during the investigation - one whose identity remains secret and two whose names appear. Always with the same story structure and very often with the same sentences and words. We find DM's name only on the last three pages, mentioned by two of the three witnesses (the secret one and a second one), while the third makes no reference to her.

DM is accused of participating in a training given to the 'cadres'[2] of the PKK for one month in 2014 One of the two witnesses who names her specifies: "*I have no information about her subsequent fields of activity nor heard any news about her*." DM worked for news agency Mezopotamya in the central office of the Diyarbakır press committee, authoring articles distributed to agencies on a weekly basis, mainly about female figures. The prosecution then looks at the HTS data of GSM numbers, specifying that she exchanged a total of 1068 incoming and outgoing calls with suspicious persons. It is not stated in which period this happened and, of course, there is no reference to the content of these calls. The prosecution points out that she exchanged a total of 335 incoming and outgoing calls with members of the organisation. The investigation states that the suspect has two consecutive records of leaving and entering northern Iraq, where Qandil is located, in 2017: this is the town where the cadre school is supposed to be located.

Furthermore, the investigation claims that DM exchanged money with several people who were facing prosecution for being members of an armed terrorist organisation.

The indictment goes on to conclude:

> "When the evidence against the suspect - named Dicle Müftüoğlu - is considered as a whole, it is understood that the suspect actively carried out activities within the Ideological Field Headquarters of the PKK/KCK armed terrorist organisation, in line with the terrorist organisation's ideology and instructions, using her social life as a cover and observing secrecy and her organisational activities have been clearly and unequivocally established with the evidence in the file, in a way that leaves no room for doubt, and as it is, it is understood that the suspect took initiative and responsibility within the organisation and is a leader of the terrorist organisation, since her activities exceeded the scope of the activities of a member of a terrorist organisation"

Let us recall that:

- the only dates emerging from the investigation are 2014 (when she is supposed to participate in the mentioned training at the camp) and 2017 (when she is supposed to have left for Northern Iraq);
- we do not know the content and period of the numerous phone calls;
- we do not know how much money was exchanged and with whom.

3.1 Grounds to Criticise the Indictment in the Light of Turkish Law

In assessing the indictment filed by the prosecutor against DM, we must start from a careful reading of Article 170 of the Turkish Criminal Procedure Code (CPC), whose purpose is to set out the elements that the indictment must contain in order to be considered valid and not fall into formal or substantive nullity.

What interests us here is point 5 of that rule: "*The conclusion section of the indictment shall include not only the issues that are unfavourable to the suspect, but also issues in his favour*". What is it that we mean by the term '*issues*'?

And before that, what is meant by the Turkish term '*hususlar*'?

Our reference is the Venice Commission, which edited the English translation of the two Turkish penal codes - the substantive one and the ritual one - and chose to translate '*hususlar*' as 'issues'. It could also have translated it as 'matters' (an easier translation, suggested by Google Translate) and the meaning of the sentence would not have changed. It could have also made use of other synonyms for 'issues' and worded it as 'conclusions', 'results', 'points under discussion', 'questions' or 'problems'. These are all synonyms that refer to the matrix of the word 'issues' that stands for the result, the outcome of a search on a given problem.

The word '*hususlar*' is intended to emphasise that there is an issue behind the research and that such research may also present results that are opposite to those that prompted it in the first place. In this case, the results differed from those sought by the prosecution because, instead, they favoured the position (assertion of innocence) of the suspect.

The term 'elements' would also have been fine, intended as elements in favour of someone, but the reference to the research completed and to its ambiguity would not have been as clear (every research ontologically moves around more than one possible solution).

It is no coincidence that the rule in Art. 170 par. 5 of CPC places a duty to set forth and consider the elements in favour of the suspect in the concluding section of the indictment. Let us bear in mind that an indictment is the summation (and also the summary) of what the prosecutor intends to make known to the court, which will then have to decide on whether to open a trial against the suspect. Therefore, such a document cannot but also contain the elements favourable to the suspect - otherwise it would guide the court towards an obligatory solution, therefore violating two cardinal points of legal culture: the necessary dialectic between prosecution and defence, and the procedural economy, which requires the court to order the trial only in the absence of (at least) one element that already decisively testifies to the absence of criminal liability. One thing is certain, the term 'issues' does not only mean the material facts (*e.g.* an alibi, a technical analysis, an expert opinion, etc.) that the prosecutor certainly has a duty to include, even if they are contrary to the accusatory hypothesis: it also means the legal facts, the logical arguments, the reasoned conclusions.

What is of interest here are, above all, the legal facts, where by legal facts we mean the previous events, either simple or complex, or the judicial decisions that have already been taken: in short, every legal and judicial element that has affected the current suspect in the past and that has, of course, some reverberation on the accusation.

There is no doubt that the prosecutor's conclusions cannot but include the occurrence of a double indictment or, more precisely, a repeated indictment - what is called *ne bis in idem* in Latin (but also in legal parlance today). Such is the case when a person is on trial (or has even been convicted by a final judgement) for certain facts and these same facts are also the basis for a new and different, or not so different, indictment. It is an institution borrowed from Roman Law and perpetuated over the centuries, always recognised by every legal system.

If the two indictments – that is, the old one for which the person has already been brought to trial and the new one for which they are to be brought to trial again – fall under the same offence, then

one can intuitively see how this is a prohibited hypothesis. But the hypothesis in which the facts are the same but their legal qualification (the offence charged) is different is just as prohibited: in fact, in criminal court defendants are held accountable for the facts, not for their position in the penal code, and the State's punitive power in relation to such facts is exhausted once they have been tried for them.

It may be that the facts for which the person has been held accountable in the past have been compounded by others that may be qualified in the same way or in an even more serious manner, for a far more serious offence. However, it is necessary for those facts to be indeed new and different from those on which the first trial was based, and for them to be stated as such (new and different) in the new indictment with absolute certainty.

Let us try to substantiate this argument by analysing the case of DM.

DM had already been tried before for membership in a terrorist organisation. This previous trial also focused on the same time period that this indictment concentrates on. Let's also add that the judges overseeing this case assessed the hypothesis that DM's actions could be integrated with the crime of 'membership in a terrorist organisation,' but later set this aside to render a verdict based on Article 6/4 of the Anti-Terror Law

Once confronted with new statements (either oral or written) concerning DM and pointing to the offence of propaganda, the prosecutor could undoubtedly have requested a trial, as new individual facts might emerge. Even if the facts had been new or different but of the same type or nature, it would have been more difficult to request trial for "membership in a terrorist group" rather than for "propaganda"; and it would have been even more difficult to justify a request for trial for "being the head of a terrorist organisation", since facts of the same nature had already been recognised by the previous judgement as typical of the crime of "propaganda" and nothing more.

In the face of the previous trial against DM, the question must be asked whether or not the indictment relates to post-2018, and nonetheless different, facts; or whether it is merely a different and unlawful reassessment of the same facts.

There is no doubt that the witnesses' statements relate to events going back a long way. When emphasising the role played by DM in the PKK cadres' school, both witnesses naming her (*i.e.* Gokalp and the anonymous witness) refer to a specific month in 2014 - hence a time covered by the two previous trials and therefore already considered by the first trial DM underwent, which excluded her membership in a terrorist organisation.

We can say with a reasonable amount of confidence that we are in a case of *ne bis in idem* or *double jeopardy*: no one can be tried (let alone convicted) twice for the same facts.

One could say, however, that such a conclusion is part of what is to be judged: we do not deem this correct, but in any case it was the prosecutor's duty to set out in the indictment the legal situation determined by the fact that at least a large part of the subject matter brought to the court's attention had already been taken into account in previous trials, so as to allow to decide whether or not to order the trial if there was sufficient evidence to do so.

The prosecutor, though, did not do so, and we believe this was a deliberate choice: to keep silent about a circumstance as important as a possible *ne bis in idem* is to mislead, to cheat the court.

Silence on this point is certainly a violation of the duties imposed on the prosecutor in drafting the indictment, in that it means to keep silent on an element that could be very favourable to the defendant. Such a violation would make the indictment null and void.

Article 170 CPC, par. 3-i also states that the indictment must contain the "*place, date and time period of the alleged offence*".

The indictment we are examining only contains a temporal reference to the summer of 2014, when

DM allegedly participated in a training for PKK 'cadres'.

All other contested facts and evidence do not contain a temporal reference:

a) no indication is given, other than in generic terms ("*in 2017*"), as to when DM would have travelled across the Iraqi border to work for the PKK;

b) no indication is given as to when DM would have transported money to help the PKK;

c) no indication is given as to when DM allegedly made calls to or exchanged messages ("hundreds and hundreds" of them) with persons suspected of belonging to the PKK.

Let us leave out the fact that the calls and messages, but also the trips abroad, could be justified by DM's work as a journalist. What is of interest here is the fact that the elements of accusation are not placed in any temporal dimension, therefore making it extremely difficult for DM to defend herself:as we have examined in the previous section, certain facts and evidence may have already been considered in the previous judgments concerning her position, which judgments have excluded her membership in a terrorist association. As already mentioned, this would be a *ne bis in idem*, forbidden by Turkish Law just as by any criminal law system.

If the dates of the alleged trips across the border are not precisely stated, it is impossible for DM to defend herself, as the prosecutor cannot require her to prove that she has not left the country for several months. In fact, the prosecution suggests that DM left the country illegally, which is why her documents do not show any border crossing.

Finally, no telephone call or message (either sent or received) was intercepted, and therefore we do not know their content - however, collocating them in time could at least hint at the continuity or the sporadic nature of those relations, thereby placing DM's supposed membership in the PKK in time and allowing us to understand whether such conduct has already been taken into account by previous sentences and whether, as a consequence, we are faced with a *ne bis in idem*.

In short, placing the accusation against suspects in time is crucial for them to be able to defend themselves and to understand the consistency of the accusations - especially if the offence is not an instant offence but rather, a protracted one, as is the case in question.

Not for nothing does the cited rule CPC Art. 170/3-i provide that indicating the time of the disputed facts is a prerequisite for the validity of the indictment, without which the document is null and void[3].

It is worth recalling here that the Venice Commission has censured Turkey because it allows charges to be brought and sentences to be imposed for terrorism based on very vague accusations unsupported by concrete and verifiable elements, within the framework of a legislation that does not clearly define what is meant by 'terrorism' and therefore lacks the binding nature that is always necessary in criminal law[4].

In the present case of DM, by contrast, the vagueness of the alleged offence is compounded by the lack of a temporal collocation of the evidence (the expatriation, and the telephone and personal contacts) and finally by the fact that one of the two witnesses referring to DM is a secret witness. Vagueness and non-verifiability are the characteristic elements of this indictment.

It is true that the CPC does allow for the use of secret witnesses (Art. 170 par. 3-e CPC), but only in cases in which disclosing the identity of the witness could pose a danger. So, the rule of the procedural code itself already places clear limits on the use of secret witnesses. A rule that goes against all principles of modern Law and is not found in any other legal system: a rule, therefore, that should have no place, as it is unconstitutional and should only be resorted to in extreme cases. We are well aware, instead, of how often secret witnesses are used in Turkey.

This is all the more serious in the case of DM, and not just for the reasons already stated

(vagueness adds to vagueness) or because the other witness, whose name we do know, uses a construction of the narrative absolutely identical to the one used by the secret witness, including the same sentences and words - so much so as to suggest that the two witnesses modelled themselves on each other, or even that they might be the same person.

These two witnesses were originally heard in a 2020 investigation (2020/5580) in which another anonymous witness was also heard, with no reference being made to DM.

3.2 Analysis of the Indictment in Light of the ECtHR and the Venice Commission

In a report dated 15 March 2016 (Opinion No.831/2015), the Venice Commission (European Commission for Democracy through Law) focused on art. 314 of the TPC and on other controversial articles of the TPC. This article was examined together with art. 220 TPC because it addresses contiguous cases of association - not necessarily of terrorist nature but nevertheless illegal. These two articles were sometimes charged and applied together[5].

The main accusation levelled by the Venice Commission at art. 314 (becoming even more serious when applied together with art. 220) is its "vagueness". There is no definition of 'terrorism' in the TPC, not even after the new wording introduced in 2013 with the Anti-Terrorism Law. Nor we find any definition or at least the definition of a framework in which the actual cases may fall - as Human Rights Watch states: "*This legal framework makes no distinction between an armed PKK combatant and a civilian demonstrator".* Since 2016, prosecutors no longer together charge the two provisions: in fact, DM was not charged with article 220. The indictment, however, does use the wording of art. 220 ("knowingly and willingly aiding or abetting") for indicting based on art. 314. The VC recommends that nobody be convicted as a member of a terrorist organisation if they are not such, as provided for by paragraphs 6 and 7 of art. 220 TPC.

But this confusion is still possible, and we should ask ourselves why. The reason is that, as the VC states, the Turkish legislator has never wanted to accept the definition of "member of a terrorist organisation" used by both the ECtHR[6] and (at times) the Turkish Court of Cassation for many years: in order to define a person as 'member', it is not enough for them to share an ideology, but proof of acts attributable to the accused is required that demonstrate, "*in their continuity, diversity and intensity*", their "*organic relationship*" with an armed organisation, or that their acts can be considered to have been consciously and intentionally committed within the "*hierarchical structure of the organisation*". This rule, the VC states, should be applied strictly.

None of these rules have been applied in DM's indictment, which - as we have already seen - is the vaguest of the many indictments for terrorism. It demonstrates how prosecutors are wont to deal with art. 314 without any solid and specific evidence; moreover, it may happen that they indict vaguely based on art. 314 and are ready to downgrade paragraphs 6 and 7 of art. 220 if the indictment under art. 314 does not hold up.

4. Conclusion and Recommendations:

We have set out in detail the reasons why DM's indictment is objectionable and even, in some respects, null and void. We summarise them below:

- DM's indictment is **null and void** because it constitutes a *ne bis in idem*. She has already been tried in two other proceedings and convicted for the same facts alleged here, but the relevant judgments excluded her membership in a terrorist organisation;

- DM's indictment is **null and void** because it does not contain any temporal reference to the time when the offences were committed - the only reference is to the summer of 2014, but DM has already been tried for these facts (*ne bis in idem*);

- DM's indictment is largely based on the statements of a **secret witness**, but the

prosecutor's deed does not explain why this witness should remain secret. Moreover, basing such an important deed on a non-verified and non-verifiable witness denotes a marked weakness on part of the prosecution.

The recommendations we feel compelled to put forward are as follows:

1) We propose that the Turkish legislator abolishes the figure of the secret witness because it is completely unconstitutional and incongruous with the system outlined in the European Treaty on Human Rights.

2) We propose that the representative of the prosecution formulates the indictments

a) placing in time (day, month, year, period of time) all the facts brought against the suspect;

b) expressly indicating, in order for the court to be aware of it, the trials and any convictions or acquittals to which the suspect has been subjected in the past, so that the court can immediately assess whether it is faced with a ne bis in idem - i.e. whether the offence has already been evaluated in court.

Endnotes

1 I met DM and her lawyer, Mr. RESUR TEMUR, on June 13 2024 at the latest hearing of the trial. She was very calm and willingly answered my many questions. Their line of defence is mainly centred on ne bis in idem, but they do not shy away from giving explanations for their behaviour other than those hypothesised by the prosecutor, and from denying what is not true and did not happen at all.

2 Cadres' are people in the organisation who received a certain period of training and were then sent to different camps/cities to carry out activities as leaders.

3 https://bianet.org/haber/eight-kurdish-journalists-sentenced-in-terror-case-297089 on 03/07/24
On 2 July 2024, eight Kurdish journalists from Mezopotamya agency were sentenced to 6 years and 3 months' imprisonment for being members of a terrorist organisation. Three others were acquitted. The charges, which date back to 2022, are very vague and, according to the defenders, are not based on documentary evidence, but only on the interpretation of testimonies devoid of adequate support.

4 https://bianet.org/haber/kurdish-journalists-sadik-topaloghu-arrested-on-chrge-he-already-received-sentence-for-297625 on 19/07/2024
Very similar to DM's case is the one of Kurdish journalist Sadik Topaloglu, of Mezopotamya agency (the same as DM): he was arrested a second time on 18/07/24 on the basis of statements by two witnesses for which he had already been arrested in 2019 and then sentenced in 2022 to 6 years and 3 months' imprisonment for the crimes of "membership" and "terrorist association" (PKK) with a judgment that has not yet been made final. In the Topaloglu case, the ne bis in idem is even clearer and more relevant than in the case of DM, as the indictment in the first trial is the same as in the second trial ("membership in a terrorist group").
We must consider that the trial referred to in the indictment is a terrorism trial and the Turkish Penal Code does not provide a definition of terrorism. So much so, that both the Venice Commission and the ECtHR have censured this legislative framework as it lacks the necessary binding nature (a mandatory prerequisite in any criminal system) and call for it to be applied very sparingly and with the necessary precautions.

5 For the use of both articles together, s. judgment of the European Court of Human Rights Gulcu v. Turkey, Application No. 17526/2019, decided on 19 January 2016.

6 Among many others along the same lines, s. the rather recent ECtHR decision: Parmak & Bakir v. Turkey (violation of art. 7 of the ECHR), which contains the following: "According to the wording of the amended section 1 of Law No.3713, the act of subscribing to a form of ideology, sharing ideas or combining with others to cultivate an interest in an ideology, is insufficient to qualify as terrorism". In the Parmak & Bakir case, the ECtHR states what the Venice Commission had already stated.

PEN NORWAY

Legal Report on Indictment: **Abdurrahman Gök**

Şerife Ceren Uysal

Journalist Abdurrahman Gök faced a series of criminal proceedings after filming and publishing the death of Kemal Kurkut, who was shot by police during Newroz celebrations. As a result of the trial, he was sentenced to 1 year, 6 months, and 22 days in prison for making propaganda for a terrorist organisation. The case is currently under review by the Supreme Court of Turkey

Legal Report on Indictment: Abdurrahman Gök

Author: Şerife Ceren Uysal

1. Introduction:

This study focuses on the 21-page indictment with the investigation no. 2020/40374 and indictment no. 2020/2303 issued by Ahmet Şahin, the Public Prosecutor of Diyarbakır on 24.09.2020 against the journalist named Abdurrahman Gök.

Between 2020 and 2021 a total of 22 indictments issued against journalists and civil society actors were analysed within the scope of PEN Norway's Turkey Indictment Project. All the legal reports critically point out that the relevant indictments did violate both domestic and international legal standards. Each analysis highlights a different problem. In some indictments, the cause-and-effect relationship that should be present in such a legal text was regarded to be absent, whereas in others, the political motivations are considered to have supplanted legal arguments. In some indictments, however, the analysis revealed that even the purely technical requirements of the Criminal Procedure Code (CPC) Article 170 were not fulfilled and these indictments are considered to be very unsuccessful as a result of their material errors.[1]

The indictment issued against journalist Abdurrahman Gök, on the other hand, differs in certain aspects from the aforementioned 22 indictments. Although a holistic legal analysis demonstrates that this indictment too failed to fulfil legal requirements, it nevertheless had a section where the evidence was evaluated, which separated it from the indictments that were analysed previously. Even the fact that an indictment could receive a positive comment because it contained an evaluation of evidence should be considered as just another indicator of the extremely low quality of the indictments in Turkey.

2. Summary of Case Background Information:

Journalist Abdurrahman Gök began his studies at the Department of Journalism at the Communication Faculty of Ege University in 2002 and started to practice journalism in 2004 while he was still a student. Gök started to perform various duties such as reporter, editor and regional news director at Dicle News Agency (DİHA) in 2004, and also worked as a war correspondent in countries such as Iraq, Iran and Syria. Today, Gök is still working as an editor at the Mesopotamia News Agency. In addition to his journalism, he is also known for his documentary titled *Border and Death* [*Sınır ve Ölüm*].

The judicial process that resulted in Gök's conviction to imprisonment actually started with the "Newroz" Spring celebrations in Diyarbakır in 2017. On March 21, 2017, Kemal Kurkut, a 23-year-old participant in the Newroz celebrations in Diyarbakır, was shot and killed by security forces in front of everyone. As Gök was at the site to observe the Newroz celebrations, he documented the moment of Kurkut's murder with 28 photos he took during the incident. The photographs

Gök took were engraved in the popular memory and won him the special jury award in Metin Göktepe Journalism Awards. Since 2017, those photos seem to have caused a spate of criminal investigations launched against him. However, the photographs fulfilled another function. Right after Kurkut was shot dead, the Governorate of Diyarbakır had claimed that Kurkut was a suspected suicide bomber. However, the photographs taken by Gök refuted those claims as the the photographs showed Kurkut running away, with his upper body naked. In other words, his photographs have essentially become the evidence of an extrajudicial execution.

In answer to the Prosecutor's summons, on March 29, 2017, Gök went to the Diyarbakır Public Prosecutor's Office, and within the scope of the investigation on Kurkut's death, he gave his testimony as a witness and submitted to the file the 28 photographs documenting the last 50 seconds of Kurkut's life.

The activist's death and the legal proceedings that ensued deserve more extensive analysis and examination. For the purposes of this report, however, it is sufficient to note for now that the police officer who was on trial for Kurkut's murder was acquitted, but Gök's journalistic activities as a whole have since been subject to many trials. A few weeks after the incident, the Chief Public Prosecutor's Office of Ankara initiated a criminal investigation on the grounds that there was a criminal complaint filed against Gök. As part of this investigation, on April 20, 2017, Gök's house was searched, and his statement was taken. However, a decision not to prosecute was ultimately made.

A few months later, a Twitter post by Gök about the United Nations' report on the basements of Cizre. The report was focusing on the alleged burning alive by the Turkish security forces of Kurdish civilians who had been taken refuge in a basement during the curfew that was going on in Cizre. And posting about this reportbecame the subject of an investigation and another decision not to prosecute was made once again.

The investigations did not stop there. After a while, Gök was called to have his statement taken again. This time, it seemed that the investigation was prompted by phone taps conducted on his phone between 2012 and 2014. After a series of questions about the news he shared with other journalists, his phone calls and the reports he wrote, a decision not to prosecute was the outcome of this file too.

On October 9, 2018, Gök's house was raided once again and he was detained. Also detained along with Gök were the journalists Semiha Alankuş, Lezgin Akdeniz, Mehmet Akdoğan, Cihan Solmaz and Esra Solin Dal, who used to work in different news agencies. Following his statement to the prosecutor's office, Gök was released after three days. As a sequel of this detention on 09 October 2018, the indictment that this report will analyse was issued on 24.09.2020. In the indictment, Gök was accused of making propaganda for and being a member of a terrorist organisation.

Following the approval of the indictment by the 5th High Criminal Court of Diyarbakır, the first hearing was held on February 23, 2021. In the hearing, the travel ban on Gök was lifted but the court ruled that the anonymous witness would be heard between the two hearings, not at an actual hearing, as has been customary in Turkey. The court must have concluded that the full contents of the case file was satisfactory enough, on June 3rd, it sent the case file to the prosecutor so that he could prepare his opinion on the merits.

In the hearing held on September 30, the judicial panel changed. The Public Prosecutor claimed that the photos shared by Gök on January 18, 2017 and November 1, 2018 on his social media account corresponded to a propaganda for an (terrorist) organisation, and he requested the court to file a criminal complaint with the Chief Public Prosecutor's Office of Diyarbakır about these social media posts. Eventually, the Court filed a criminal complaint and a lawsuit was filed over these two photographs. At the hearing on January 20, 2022, this new case was consolidated with the ongoing case. At the hearing dated March 31, 2022, the prosecutor's opinion was pronounced. The prosecutor requested that Gök be acquitted on charges of membership in a terrorist organisation, but demanded that he be punished on charges of making successive propaganda for a terrorist organisation.

During the final hearing on June 30, the Court ruled that journalist Gök was not proven guilty of membership in an armed terrorist organisation and therefore acquitted him of the charge, but also ruled that he be sentenced to 1 year, 6 months, and 22 days of imprisonment on charges of making successive propaganda for a terrorist organisation. That the Court stated, in its reasoned judgement, that Gök's defence was "disregarded because its aim was to evade the accusations" will be a phrase to be remembered for years in Turkish legal history.

Gök's case was upheld by the Court of Appeal on 12 January 2023. His lawyers announced that they will appeal to the Court of Cassation.

3. Analysis of the Indictment:

3.1 Summary of the Indictment:

"That the Court stated, in its reasoned judgement, that Gök's defence was "disregarded because its aim was to evade the accusations" will be a phrase to be remembered for years in Turkish legal history.

Gök's case was upheld by the Court of Appeal on 12 January 2023. His lawyers announced that they will appeal to the Court of Cassation."

It is necessary to provide an overview of the structure and content of the indictment in order to make this report understandable for the reader. The indictment contains various subheadings, albeit without systematic organisation. At least the subtitles make it easier to follow the content.

The first 11 pages provide general information about the organisation called Kurdistan Communities Union (KCK) but do not make any references to Gök himself. The titles in this section are as follows:

- KCK/TD (Kurdistan Democratic Union[2] / Turkey Desk),
- KCK Convention,
- Structural Changes in KCK Structure,
- KCK Organisational Systematic and its Higher Leadership,
- General Presidency Council of KCK,
- Provincial Organisations in KCK Methodology,
- KCK / Turkey (Democratic Society Confederalism),
- KCK/TD (Kurdistan Communities Union / Turkey Desk),
- Central Press Committee on the Ideological Sphere
- Meya-Der (Mesopotamia Association of the Relatives of the Disappeared),
- Solidarity Association for the Families of Prisoners and Convicts,

It is usual for the indictments to contain information about the structure of the organisation if membership to a terrorist organisation is among the offences charged to a person.

However, this information must be linked with the person who is charged with relevant offences. Obviously, the suspect cannot be linked with the terrorist organisation through the mere fact that a terrorist organisation has a media unit, and the suspect is a journalist. It is unclear at any point in the indictment against Gök why references to Medya-Der, the Solidarity Association for the Families of Prisoners and Convicts, and other similar institutions that were claimed to be sub-units of the terrorist organisation were included in the indictment. As such, the first 11 pages of the indictment are reminiscent to the indictments of Nedim Türfent, Ahmet Altan, Can Dündar and others, which were evaluated within the scope of this project.

This section is followed by another one entitled "START OF THE INVESTIGATION" in capital letters. Following a single-paragraph explanation, this section provides an evaluation of the evidence. The following subheadings are included in the evidence evaluation section:

- wiretaps,
- statements about him,
- demonstrations in which he was involved,
- open intelligence research on him,
- criminal complaints issued against him

Although it is not possible to agree with the way the prosecutor assessed the evidence, it is precisely this positive aspect that distinguishes the indictment from the indictments examined within the scope of PEN Norway's project. Among the indictments analysed within the scope of the project, this one stands out as it clearly recorded and evaluated the evidence, though it still lacked a satisfactory methodology, essential information about the acquisition of the evidence, and an evaluation of its legality. However, political motivations and a desire for punishment continued to influence the assessment.

Following this section, the prosecutor of the indictment again avoided using subheadings and tried to establish a link between the alleged offence and the evidence in an attempt to seek Gök's punishment. Here, even though the section contained logical inconsistencies as it tried to establish a strained link between the accusation and the evidence using cliched phrases, the prosecutor tried to do what should legally be done in an indictment.

In this context, as will be elaborated upon later, it might be argued that we are presented with a legal document that was drafted with political motivations in mind, but also attempted to technically fulfil the expectations of an indictment.

3.2 The Analysis of the Indictment (and the Investigation) within the Scope of CPC Article 160:

CPC Article 160 prescribes the duties of the public prosecutor. According to the law, as soon as the public prosecutor is informed of a fact that creates an impression that a crime has been committed, either through a report of crime or any other way, she or he shall immediately investigate the factual truth, in order to make a decision on whether to file public charges or not. This article of the law, which merely repeats a well-known fact, is particularly significant. Here is how the indictment against Gök justified the investigation under the subheading "starting an investigation":

> Upon receiving the information that the activities carried out by the KCK/TD (Kurdistan Communities Union / Turkey Desk), which was established to coordinate the units that operate within the country on behalf of the terrorist organisation named PKK/KCK and to organize all kinds of terrorist actions in line with the orders of the organisation, is coordinated from inside our province, that the province of Diyarbakır has become the alleged centre of KCK/TD activities and that certain individuals have been operating

> within the aforementioned unit, those individuals were caught and detained after an operation that was carried out within the scope of the investigation number 2018/5079 by the Chief Public Prosecutor's Office of Diyarbakır (The Investigation Bureau of Terrorist Crimes). It has been assessed that the suspect has been operating within the PRESS AND PUBLICATIONS COMMITTEE UNDER THE COORDINATION OF KCK/TD INSTITUTIONS, and the evidence obtained about him is as follows; (...)

The indictment starts to list and evaluate the evidence after this paragraph, but it is this paragraph that rendered the indictment legally insufficient. Because the reasons that caused the prosecutor to start this investigation and collect any inculpatory or exculpatory evidence about Gök under CPC Article 160, remain unclear throughout the indictment. The prosecutor had two simple questions to answer:

- - What is the connection between journalist Gök and the investigation numbered 2018/5079 referred to here?

- - What is the source of the "suspicion" that led to the assessment that "the suspect has been operating within the PRESS AND PUBLICATIONS COMMITTEE UNDER THE COORDINATION OF KCK/TD INSTITUTIONS"?

The fact that the indictment did not answer these two questions means that the relevant investigation and the indictment that comes out as a result invert the entire logic of criminal investigation. This is because CPC Article 160 refers to the process before the drafting of an indictment, and says; "you cannot investigate without an initial suspicion", which means "you cannot start collecting inculpatory or exculpatory evidence without initial suspicion". This means that a prosecutor must have an initial suspicion before attempting any legal action against a person, let alone writing an indictment. As the subject of the criminal procedure, the suspect has the most fundamental right to be informed about the source of this suspicion. The fact that the prosecutor failed to explain why an investigation was launched against Gök in the indictment, strengthens the plausibility of the allegations frequently voiced by both Gök and his lawyers and press organisations in Turkey that "this investigation was a revenge against Gök who took photographs of Kurkut and published them to expose an act that the government wanted to cover up". In this sense, the contents of the indictment raise less questions about why the indictment was drafted than why an investigation was launched against Gök in the first place.

3.3 The Analysis of the Indictment within the Scope of CPC Article 170:

A table that summarizes the function of the CPC articles in a criminal investigation can illustrate the relationship between the indictment and the CPC:

Article	Subject	Explanation	Current Indictment
CPC Article 160	Initial suspicion	No investigation can be launched without an initial suspicion, otherwise the process will be crippled from the beginning.	As explained in detail above, the "initial suspicion" that would lend legal credibility to this investigation against Gök cannot be found in the indictment.

CPC Article 170/1	The indictment must be prepared by the Public Prosecutor.	Otherwise, the indictment will be null and void. Despite observations indicating that police records often become indictments, as long as the indictment bears the signature of a prosecutor, it will be deemed to have been written by him.	The indictment has the prosecutor's registry number and signature, and this criterion has been met.
CPC Article 170/2	An indictment cannot be written without a reasonable doubt.	If the indictment lacks reasonable doubt, even if all other elements are present, it may be questionable whether the document meets the technical requirements for an indictment.	This point will be dealt with below.
CPC Article 170/3	Mandatory information to be included in the indictment (identity, date, place, etc.)	Considered as the formal elements of an indictment, these information may vary in importance depending on the specifics of the case. For example, the date of the alleged offense may be important enough to determine whether a lawsuit can be filed. Therefore, this is an essential criteria that must be met.	The requirements of this article have been fulfilled.
CPC Article 170/4	The events that comprise the charged crime must be explained in the indictment in accordance to their relationship to the present evidence and information that is not related either with the charged crime or the evidence must be excluded.	This requirement, which pertains to the right not to be labelled as a criminal and the right to defence, is crucial for an effective indictment.	Events and evidence – The requirements under Article 170/2 have been fulfilled, and in this sense, the evidence has been clearly listed and the title of evaluation has been opened, although the issue of reasonable doubt needs to be discussed further. It is noted that no information was presented to determine the legality of certain evidence. In comparison to many others, the indictment in question is a successful but still incomplete one.

CPC Article 170/5	The conclusion section of the indictment must include not only the issues that are disfavorable to the suspect, but also issues in his favor.	The prosecutor's duty is to bring a public lawsuit and this Article ensures that he/she does not fulfil his/her duty with a "purely punitive reason" and is an important tool to measure the objectivity of the prosecutor. In this respect, this regulation is an important criterion to measure the efficiency of the indictment, as it will also reveal whether objectivity is replaced by groundless punishment.	The only aspect of the indictment that favours the suspect is the lack of criminal evidence discovered during the search of his house. The inclusion of this fact is a welcome remark that sets this indictment apart from many others previously analysed. However, the fact that the suspect was a journalist was ignored at every stage of the indictment.
CPC Article 170/6	At its conclusion section, the indictment must clearly state which punishment and measure of security as foreseen by the related Law is being requested to be inflicted.	It is one of the criteria of an effective indictment as regulated in the law, but its absence does not completely cripple an indictment.	The requirement of this article has been fulfilled.

The table above can be thought of as a report card. And apart from the disputed case of initial suspicion, the main problem revolves around the issue of whether the indictment was based on reasonable doubt. If there is sufficient suspicion, the indictment could relatively be considered as a very effective legal text that complies with the legal requirements (that is, omitting the evaluation regarding the initial suspicion). Otherwise, all of the other achievements of the indictment would become ineffectual and the justification for drafting an indictment would be lost.

As such, the indictment has to be evaluated with that in mind.

As summarized above, the indictment explained the evidence about Gök, recorded the content of the evidence if not the sources, and the evidence was evaluated by the prosecutor. In the conclusion, the prosecutor deemed these pieces of evidence as providing reasonable doubt that the offense of membership in a terrorist organisation and/or propaganda for a terrorist organisation was committed.

First of all, under the title of telephone wiretaps, the indictment assessed the records of the communication in question. The first phone record consisted of a series of text messages with an unknown person. In the message, the unidentified person asked Gök to share with him one of the refugee photographs he took, and Gök accepted. After providing some information about the PKK/KCK press and broadcasting structure, the Prosecutor made the following assessment about the conversation:

> It has been concluded that the suspect took part in the organisation called the Press and Broadcasting Committee within the PKK/KCK terrorist organisation.

The reader, however, is unable to follow the path that led to this conclusion. An unidentified person (this person may be an NGO employee, another journalist – we have no information on this matter, neither does the prosecutor, as can be seen from the indictment) asks for a photograph from a journalist, who has also made a documentary on the border areas. We do not know where that photograph would be used. A "reasonable doubt", namely, a suspicion backed by evidence is essential to reach the same conclusion as the prosecutor, that the person sending the message was a member of a terrorist organisation and that the photographs would be used to make propaganda for a terrorist organisation. Moreover, we need to understand what kind of propaganda

content the photographs of refugees would be used for. However, the indictment's assessment against Gök was made without any need to discuss all these matters. For the reader, a natural extension of Gök's identity as a journalist, that is, a messaging content that was normally in his favour was turned into evidence against him.

In the second phone call, the caller wanted to get information from Gök about a news report recently published by news agencies and asked what the abbreviated name of an institution (legal or illegal, that anyone who worked as a journalist in the region could know) stood for. Gök told them the agency and the full name of the institution. That was the entire conversation. The prosecutor came to the following conclusion, which should worry us all:

> It is concluded from the content of the conversation that the suspect was in contact and linked with foreign organisations acting in line with the goals of the terrorist organisation.

The reader still asks, nervously, "How was this conclusion reached?" and her question is left unanswered. Because knowing what the abbreviation of an organisation stood for was considered as the evidence of being in contact and linked with that organisation.

That was followed by another long conversation of Gök's. It is evident in this conversation that Gök, as a journalist was talking, very enthusiastically, about a news report they had prepared, that he submitted the news report, and it was important to him to disseminate it. In this conversation, he openly used the phrase "we have prepared the news report". He was excited about the news, because he thought that in the report some of the images, they accessed using Google Earth, refuted the statements made by the Turkish Armed Forces. For a journalist, each moment when she or he reveals the truth must be exciting. The prosecutor, on the other hand, concluded that this conversation was an evidence of Gök's participation in the Press Committee once again. However, the most effective conclusion to reach should be the possibility that Gök's news may annoy some institutions within the state mechanism...

In the next conversation, Gök asked the person he called if he/she was on duty, and when he found out that he/she was not, they engaged in small talk. And the subject of the last meeting was again clearly about a digital news report. With these conversations, the prosecutor again arrived at the same conclusion but without explaining why and how.

That's what all "phone wiretaps in this case" are about. In short, they are all conversations that neatly fall within the scope of the professional activities of a journalist, coherent with the natural flow of life and they are journalism oriented.

Then the indictment moved on to the second category of evidence. Under the heading "Statements About Him", presented are the statements of an anonymous witness named "Sabır".

"The indictment's assessment against Gök was made without any need to discuss all these matters. For the reader, a natural extension of Gök's identity as a journalist, that is, a messaging content that was normally in his favour was turned into evidence against him."

Sabır said the following:

> "PHOTO NO. 89: I know this person as Abdurrahman GÖK. I learned his actual identity information as Abdurrahman GÖK (TC:) in here from you. He is one of the members of the organisation responsible for the Press and Broadcasting field of the KCK, which was established in line with the views of Abdullah ÖCALAN, the leader of the PKK/KCK terrorist organisation, and which was organized almost as a parallel state structure of the PKK/KCK terrorist organisation, which is the umbrella structure of the Terrorist Organisation. He ensures that news reports containing propaganda for the PKK/KCK terrorist organisation are published and broadcast on TV channels, newspapers, journals, radio channels and websites that work on the basis of making propaganda of the PKK/KCK terrorist organisation and sees that the content they publish or broadcast helps create feelings of hatred and resentment in the people against the state in line with the interests of the PKK/KCK terrorist organisation."

The average reader fails once again to understand how Sabır's words could raise reasonable doubt. Because Sabır's narrative did not contain a single concrete fact. As such, it did not present any facts that Gök could refute. If we try imagine such a statement as an equation, we can think of it this way:

Statement of the secret witness named Sabır versus the Statement by Gök

When the equation is so simple and there are no facts to support the statement of one of the parties (Sabır) or to give grounds for reasonable doubt, then, in accordance with the right not to be labelled as a criminal, emphasis must be shifted on the statement of the other party (Gök's), without him having to prove anything. But this was not what the prosecutor did. On the contrary, in the conclusion section of the indictment, we get to learn that the doubt the prosecutor found reasonable enough as a basis upon which to write the indictment were the statements of the person named Sabır, the origin of whose importance and credibility we will never know or get to learn. The prosecutor says the following:

> Considering the entire scope of the file, especially the statements given by the anonymous witness SABIR on 19/01/2018 and the conversations in the phone wiretaps, the press release by the suspect broadcasted on the TV channel under the guidance of the terrorist organisation, the social media posts by the suspect obtained from open sources and his international travel records...

The telephone wiretaps and the statements of the witness named Sabır have already been evaluated above and have been found to be insufficient to serve as the basis of a reasonable doubt. But when we consider the rest of the evidence, it is clear that they are even weaker than the first two. For example, the indictment itself acknowledged that what the prosecutor called a press statement was in fact was not. It was a speech delivered by Gök at a forum organized as part of the Kurdish Journalists' Day. We get this information from the indictment without further research. There, Gök made an impressive speech entirely about the problems faced by journalists and he explained his take on the profession. In other words, there was no press release and we can clearly understand from the evidence assessment section of the indictment that the prosecutor also knew that it was not a press release. Of course, it is not an offence to make a press statement, but the conclusion part of the indictment misrepresented a speech given in a legal forum where the person was an invited speaker, which adds to our doubts about the actual intention of the prosecutor in drafting the indictment.

All the evidence, which was allegedly obtained from open sources, consist of Gök's social media posts... And even more interestingly, all these social media posts contain only news-related content. International travel records mentioned at the end show that Gök entered and exited in and out of Iraq "legally" seven times in 2015 and 2016.

If we return to the table above we will see that the prosecutor's task is to evaluate the issues in the suspect's favour. For some reason, however, the prosecutor of this indictment ignored the fact that

Gök was working as a war correspondent in Iraq at that time.

Another issue that the prosecutor omitted in the conclusion was the search conducted in Gök's residence. In this search, newspapers with 85 different issue dates and digital material were "seized". As stated in the indictment; "The analysis of digital materials revealed no crime or criminal elements". In the conclusion section of the indictment, however, the prosecutor did not feel the need to point that out.

Ultimately, all the evidence under consideration supports Gök's defence, which is summarized in a single line in the indictment:

> In his defence, the suspect declared that he was not involved in an illegal act and that he was working within the scope of his journalistic activities.

At this stage, we have no choice but to go back to the table above and write that the indictment in question failed to fulfil the requirements of CPC Article 170/2. Again in the same column, the consequences of failing to fulfil the requirements of the relevant regulation are clearly stated: "If the indictment lacks reasonable doubt, even if all other elements are present, it may be questionable whether the document meets the technical requirements for an indictment."

To summarize, the indictment was written as a result of the investigation that was carried out without initial suspicion and apparently have lasted for at least 2 years and it clearly violates CPC Article 170/2 as it demands, without reasonable doubt, that Gök be punished for being a member of a terrorist organisation and making propaganda for it.

"The indictment was written as a result of the investigation that was carried out without initial suspicion and apparently have lasted for at least 2 years and it clearly violates CPC Article 170/2 as it demands, without reasonable doubt, that Gök be punished for being a member of a terrorist organisation and making propaganda for it."

3.4 Analysis of the Indictment in the Context of International Law and Regulations on the Role of Prosecutors:

As stated in the case-law of the ECtHR, indictments play a crucial role in the criminal process; because 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.[3] As we have previously noted in other legal analysis reports, an indictment that does not comply with the requirements of CPC Article 170 is more likely to violate the right to a fair trial prescribed by Article 6 of ECHR. It is certainly possible, during the trial stage, to prevent these potential violations from occurring. However, one should note that an incompetent indictment infringes upon many fundamental rights and freedoms, especially the presumption of innocence and the right to defence. Especially considering the year of the detention was in 2018, the year the indictment was issued was 2020 and the year verdict was handed down was 2022 (additionally, a prison sentence is under appeal as of now), it becomes clear that we are talking about a person who has been under the threat of punishment for at least 4 years and the extent of the problem can be more fully understood.

The legal analysis conducted in accordance with domestic

law revealed that the main issue with this indictment was the prosecutor's determination to issue it despite the lack of sufficient evidence to establish reasonable doubt. In the indictment, the prosecutor referred to freedom of expression with a single sentence and stated, without any justification, that Gök's actions should not be considered as falling under the protection of freedom of expression. However, he did not even feel the need to talk about freedom of the press, for example. It is understood that the prosecutor "does not recognize" Gök as a journalist.

Frankly, the way the indictment was structured once again points to a political motivation that dismissed the requirement of doubt and was bent on punishing the defendant. A review of the subjects dealt within Gök's news reports mentioned in the indictment reveals that Gök did not prefer to engage in an uninvolved type of journalism. The news reports he wrote about Kurkut and the photographs he took led to a criminal action against a police offence that would otherwise go down as an operation to neutralize a suicide bomber, even though the final verdict in the case in question was not satisfactory. In many of his stories, Gök has covered the problems faced by refugees. The phone conversation quoted in the indictment showed that Gök had been preparing a news report that refuted the official statements of the Turkish Armed Forces. This whole spectacle raises the question of whether it is actually this type of unyielding journalism itself that the prosecutor wanted to see punished. Also quoted in the indictment, the following statements by Gök during his speech at the forum were certainly thought-provoking:

> You the press workers, the broadcasting labourers who are trying to inform us at the cost of their lives on the battlefields, I too congratulate your Kurdish journalists day. Honestly, my topic is a difficult one. Because as Kurdish journalists and journalists in Kurdistan, you all face with pressures. That's why it's hard for me to talk about the topic in front of all of you. (...) For years, the politics has been getting harsher and harsher, and the level of oppression is escalating day by day. Journalists are the ones who suffer the most from these pressures. I mean, this has always been the case since the emergence of publications. If a journalist has taken on the burden of publishing the truth, the prices she'd pay got higher and heavier.

The main issue here is the prosecutor's motivation to punish the suspect, which did not stem from doubt, and his disregard for fundamental rights and freedoms. It should also be noted that if this conclusion, which is but a strong doubt for now, is accurate, then it is highly likely that the indictment and the proceedings that followed it may have violated Article 18 of the ECHR.

In this context, kept in mind should be the UN Guidelines on the Role of the Prosecutors Principle 12, which we have been frequently citing within the scope of the project. According to that principle;

> 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.

It can comfortably be claimed that the Prosecutor completely ignored Principle 12, given that the indictment has an attitude that seeks to restrict the freedom of expression. Principle 13/b of the same Guidelines should absolutely be kept in mind. According to this principle, the prosecutors shall protect the public interest, act with objectivity, and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect. The prosecutor's choice to ignore the evidence in favour of the suspects means that he chose to act in opposition to the principle referred to above. It must also be noted that the prosecutor who drafted the indictment in question acted against the Article 14 of the Guidelines as well. Accordingly, prosecutors shall not initiate or continue prosecution when an impartial investigation shows the charge to be unfounded. In fact, the principle underlines that they must make every effort to stay proceedings. Unfortunately, the legal findings above reinforce the impression that the Prosecutor of the indictment made a deliberate effort in the opposite direction.

The Human Rights Manual for Prosecutors prepared by the International Association of

Prosecutors includes the following statements:

> Public prosecutors apply the law and see that it is applied. By doing so, the public prosecutor operates not on his or her own behalf nor on behalf of any political authority, but on behalf of society, and must therefore observe two essential requirements: on the one hand, the rights of the individual and, on the other, the necessary effectiveness of the criminal justice system, for which the public prosecutor is partly accountable.[4]

Unfortunately, with his attitude that disregarded freedom of the press and freedom of expression, the prosecutor not only failed to fulfil these two basic requirements, but also reinforced the impression that he was acting on behalf of the political authority with a direct motivation to see the defendant punished.

4. Conclusion and Recommendations

This conclusion section will not reiterate the critical comments that were previously offered in the earlier sections. However, it will suffice to state that there is a pattern here. Over the past few months, numerous rights defenders, journalists, and opposition politicians such as, among others, Şebnem Korur Financı and Ekrem İmamoğlu have faced indictments or court sentences as a result of their statements, interviews, and social media posts. The newly enacted disinformation law is bent on forcing every dissident individual in Turkey to practice self-censorship. Can steps be taken to prevent the drafting of such indictments, which, by the mere fact that they are written, so clearly infringe upon the freedoms of expression and press and undermine the right to a fair trial? Indeed, this is one of the basic questions to be asked about the judicial system of Turkey. In fact, this question has been answered many times.

As we have underlined before, having prosecutors work with a fixed template will not solve all the content-related problems in the indictments, but it will at least serve as a benchmark for the prosecutors to examine the content they produce and the conclusions they reach.

It has once again become essential to mention Article 7 of the Recommendation Rec(2000)19 of the Committee of Ministers to Member States on the Role of Public Prosecution in the Criminal Justice System. As underlined by the Recommendation, pre-vocational and in-service training of prosecutors is both a right and a duty for prosecutors.[5] Again, Article 27 of the Recommendation stipulates that the prosecutors should not continue prosecution when an impartial investigation shows the charge to be unfounded.

In this context, an important resource could be the aforementioned and highly comprehensive Human Rights Manual for Prosecutors by the International Association of Prosecutors.

As stated by the United Nations guide on The Status and Role of Prosecutors, the rule of law cannot be upheld, nor can human rights be protected, without effective prosecution services that act with independence, integrity and impartiality in the administration of justice.[6]

However, as we all know, these recommendations will not be enough to solve the structural problem of indictments. It is evident that a shift must occur in the authoritarian and anti-democratic political climate that encourages or emboldens prosecutors to draft such indictments or reassures them when they transform such accusations into indictments.

Endnotes

1 PEN Norway's final reports for the years 2020 and 2021 compile the Legal Reports on Indictments and could be accessed through the following links: PEN-Norvec.pdf (norskpen.no), PEN-Norvec-Iddianame-Projesi-2021_Tr.pdf (norskpen.no)

2 Even KCK means the Kurdistan Communities Union, in the indictment it is written as above.

3 ECtHR, Kamasinski vs. Austria, 1989, / 79

4 See: https://www.iap-association.org/Resources-Documentation/IAP-Human-Rights-Manual

5 The training topics in the Recommendation are as follows:
a. the principles and ethical duties of their office;
b. the constitutional and legal protection of suspects, victims and witnesses;
c. human rights and freedoms as laid down by the Convention for the Protection of Human Rights and Fundamental Freedoms, especially the rights as established by Articles 5 and 6 of this Convention;
d. principles and practices of organisation of work, management and human resources in a judicial context;
e. mechanisms and materials which contribute to consistency in their activities.

6 https://www.unodc.org/documents/justice-and-prison-reform/HB_role_and_status_prosecutors_14-05222_Ebook.pdf

PEN NORWAY

Turkey's Journalists in the Firing Line for 'Targeting officials'

Article by Şerife Ceren Uysal

In Turkey, journalists, especially court reporters, face prosecution for merely mentioning a judge or prosecutor in a news story—accused of "targeting public officials for terrorist organisations." This article reveals how vague anti-terror laws are used to punish journalism and intimidate those who report on the justice system.

Turkey's Journalists in the Firing Line for 'Targeting Officials'

Author: Şerife Ceren Uysal

Introduction

For many years, Turkey's Anti-Terrorism Law No. 3713 (TMK) has been heavily criticised for its vagueness and excessive scope of application. Dozens of violation judgements by the European Court of Human Rights (ECtHR) eventually led to a change in Article 7/2 of the Law, but in practice any dissidence and/or critical expression against the government is still broadly prosecuted under this article. The law contains another provision that frequently summons journalists to courts: That is the first paragraph of Article 6 of Law No. 3713 entitled "Disclosure and Publication". The phrasing of the paragraph in question is as follows:

> Those who announce or publish that a crime will be committed by terrorist organisations against persons, in a way that makes it possible to identify these persons, whether or not by specifying their names and identities, or those who disclose or publish the identities of state officials that were assigned in fight against terrorism, or those who mark persons as targets in the same manner shall be punished with imprisonment from one to three years.[1]

As the phrasing of the article suggests, the Article is an eclectic regulation that defines multiple acts as offences at the same time. But more importantly, it is far too vague and also gives a lot of room for interpretation. Facing criticisms since its entry into force, this Article is currently weaponised against journalists, especially who report or write articles on court cases of public interest.

Even More Journalists Tried Under Anti-Terror Law Article 6/1 in 2023

A revision within the Ministry of Justice's system for publishing judicial statistics made it impossible for the public to access the exact number of investigations and prosecutions according to the type of offence. Although the Ministry presented this as a revision in its reporting policy[2], it in fact has become yet another obstacle to transparency. Statistical data crucial for analysing the connection between the political regime in Turkey and the judiciary are no longer being publicly disclosed.

However, many press and journalist organisations in Turkey have multiple open databases to facilitate the monitoring of their colleagues' trials. A comparative analysis of these data from different sources reveals that there has been an increase in the number of criminal investigations and prosecutions under TMK Article 6/1 in 2023.

According to these sources, in the three-year period between 2020 and 2022, the number of journalists on trial for the offence of "targeting officials" was 22, while by the end of November 2023, that number has already reached 20. It's easy to surmise that these numbers only scratch the surface of the true picture. This is because the aforementioned databases contain information exclusively about journalists who are more closely associated with various professional organisations. Many journalists such as internet journalists or local journalists, who work outside of these networks may not be included in this data.

Another notable observation is that journalists prosecuted under Article 6/1 of the Anti-Terror Law often share a common trait: they either write columns on the judicial system in Turkey or report on cases that generate considerable public interest. Such accusations are usually based on the allegation that a mere mention of the name of a prosecutor or a judge in a news report constitutes the act of marking officials a target for terrorist organisations. While the names of judges and prosecutors of all courts in Turkey are readily available on the internet, it is plainly absurd that reporting on these individuals can be subject to prosecution. Even more absurd is the explicit reference by Article 6/1 of the Anti-Terror Law to "State officials that are assigned in the fight against terrorism". It is both a legal error and a problematic political approach that could potentially undermine the independence of the judiciary to consider a prosecutor or a judge as a state official who was assigned in the fight against terrorism. Claiming that a judge, by virtue of the character of the court they are assigned to, is automatically considered a state official who is assigned to fight against terrorism goes against the presumption of innocence in all proceedings conducted within that court.

Journalists at Risk when Reporting in Court

As part of the PEN Norway Turkey Indictment Project, we analysed an indictment against woman journalist **Canan Coşkun** on charges of targeting state officials.[3] The news report[4] that led to the prosecution of Canan Coşkun was published in Cumhuriyet Newspaper and was about a police operation that resulted in the arrest of 14 lawyers. Coşkun faced prosecution for incorporating the testimony of a contentious witness, pivotal to the investigation, into her news report, which was devoid of commentary and comprised factual accounts. In other words, the indictment against Coşkun defined this "witness" as a person fighting against terrorism. Coşkun was sentenced to 2 years and 3 months of imprisonment at the first instance court and then acquitted on appeal. However, this was not the only case in which Coşkun was put on trial for "targeting state officials". Coşkun had previously been put on trial for a news report on the criminal investigation into the death of Berkin Elvan an eleven year old boy, who was shot while going to buy bread during the Gezi Park protests of 2023. Coşkun covered an important development in the related criminal investigation concerning the identification of the perpetrator and she was put on trial despite the fact that her report[5], which was about the court defence of the police officer who allegedly shot Elvan, omitted the surname of the officer.

The third case against Canan Coşkun on the same charge was filed after she posted on Twitter6 (now X) her news report7 published by the news website Diken. The content of the Twitter post in question was as follows:

> *The evidence in the DIAYDER indictment, reviewed by the Istanbul 14th High Criminal Court headed by Akın Gürlek, the same judge who sentenced Selahattin Demirtaş, Canan Kaftancıoğlu, Sırrı Süreyya Önder and ÇHD (Progressive Lawyers' Association) lawyers to prison, dates back 16 years. Details in the report:*

This investigation paved the way for Coşkun's trial which took many months and was initiated with a criminal complaint issued by Akın Gürlek, who was a judge at the time and who is currently the Deputy Minister of Justice and a member of the Council of Judges and Prosecutors (HSK). As a result, an indictment was issued against Coşkun on 12 April 2022. The judge was the same person who had previously sentenced Coşkun to 2 years and 3 months of imprisonment. While Coşkun was acquitted at the end of this trial, she was not the first nor the last journalist to face charges for the same offence with comparable criminal complaints.

For a journalist, it is evident that facing repeated trials for the same offence can have profoundly corrosive effects. When we asked Coşkun about the impact of these trials on her, she stated that she has long felt ensnared in a spiral of trials:

> "One trial follows the next. Lately, the number of court cases around the allegation of "targeting state officials" has increased so much that my colleagues and I find ourselves regularly exchanging news of our acquittals and reasoned judgements. Nevertheless, the prosecutors continue to seek punishment for us. Recently, journalist Ayça Söylemez was put

> on trial for reporting about the sentence given against me by former judge Akın Gürlek. All the journalists Gürlek issued criminal complaints against have been acquitted so far. Ayça Söylemez submitted all the relevant judgements to the court, but the prosecutor continued to demand a custodial."

As mentioned in Coşkun's statement to PEN Norway, the case against Ayça Söylemez is ongoing. The indictment against Ayça Söylemez is based on her column titled "Talented Mr. Judge" published in Birgün on 18.02.2020.[8] Söylemez's first hearing was held in November 2023 and was adjourned to 19 March 2024, following the prosecutor's opinion that Söylemez be sentenced to imprisonment.

The indictment against Söylemez contains the following statements:

> After all these explanations, it is understood that the suspect Ayça SÖYLEMEZ mentioned the victim, who was the President of the Assize Court in charge of anti-terrorism on the date of the incident, by name in the content of the internet news article entitled "Talented Mr. Judge" published on https:www.birgun.net/net/amp/haber/yetenekli-hakim-bey-288416?__twitter_impression=true internet; disclosed the cases he had handled in the course of her duty; that the content of the article subject to the investigation was in the nature of targeting and exposing the state officials to the armed terrorist organisations, as described by the Article 6 of the Law No. 3713; and that as it is the suspect that has committed the act of targeting Akın GÜRLEK as a person who fights against terrorism under legal protection.

The highlight in this excerpt from the indictment is the claim that Söylemez disclosed the cases handled within the scope of an official duty. This kind of disclosure is virtually impossible in Turkey, given that the appointments of judges and prosecutors are published on the internet once they are confirmed, making this information readily accessible to the public. Which means that the courts and all the judges serve in them is information that can be accessed on the internet. At the same time, it is publicly known that it was the same judge who handed down the sentences in all the cases of lawyers such as those of the Progressive Lawyers' Association, physician Şebnem Korur Fincancı, columnist and politician Sırrı Süreyya Önder, journalist Canan Coşkun, opposition politician Canan Kaftancıoğlu, HDP (Pro-Kurdish party, Peoples' Democratic Party) Selahattin Demirtaş, singer Atilla Taş, and journalist Murat Aksoy, among others, which were handled by different or the same courts. All these trials were conducted in full public view, dozens of news reports and articles were written about them, and most of them were monitored by international non-governmental organisations. Moreover, it is the same judge who declared journalist and editor Can Dündar, a fugitive and ordered the seizure of his real estate. The same judge also did not implement the Constitutional Court's ruling on the release of then-imprisoned MP Enis Berberoğlu. As such, it is quite normal for these trials or the judgements rendered in these trials to be discussed in public.

When we asked Ayça Söylemez what she thought about the ongoing trial, she stated the following:

> *"As I stated in court, the prosecutor's argument of 'disclosure' is invalid from the outset, because all the statements and information in my article, which I wrote years ago and which is the subject of the accusation, are based on statements made in the hearings of cases already followed by the public. In other words, I am accused of a very basic journalistic activity such as reporting newsworthy*

> *statements made in a public trial. The accusation of 'marking the state officials as targets' is also completely baseless, nobody is marked as a target in the article, nor is there any name of an organisation or a direct accusation against the person in question."*

A few years before Coşkun and Söylemez, on 23 March 2020, an indictment had been issued against journalist Buse Söğütlü on charges of marking people as targets. After a 2-year trial, Söğütlü was acquitted of the charge in February 2022.[9]

Söğütlü: These Cases Are Like the Sword of Damocles.

Söğütlü underlined that the trials under Article 6/1 of the TMK are conducted to silence journalists, adding that:

In recent years, we observe that lawsuits filed with this accusation have been hanging over journalists like the sword of Damocles. Neither of the terms "assigned in the fight against terrorism" nor "marking as targets" are adequately explained in the accusation part of the indictment. This lack of clarity results in the possibility that nearly every news report, where journalists exercise the public's right to be informed and write about public officials, may fall under the purview of this accusation. However, journalism is partly about bringing to light the actions and conduct of public officials that go beyond their duties and informing the public about them.

In an atmosphere where we are confronted with new judicial scandals every day -and this is even acknowledged by some figures in the ruling party- journalists are impeded from reporting on public officials whose names are associated with scandals, which sends a very clear message: Journalists and the profession of journalism are not safe, and only the journalistic activities carried out within the limits set by the government are acceptable.

> "Criminal legislation in Turkey resembles a minefield for journalists. Hanging over the journalists, that sword of judicial threat naturally affects all aspects of social life. Journalism as a profession is directly related to the public's right to be informed, and the pressure and judicial harassment in this field has consequences for society at large"

Moreover, the overly long judicial processes, which sometimes can last for years, itself works as a punishment regardless of how the case is concluded. You don't have to sentence the journalist after this accusation; judicial control "measures" such as a ban on leaving the country are already applied throughout the trial, subjecting journalists to a threatening process in various ways. And as the people in question are "powerful" public officials, there are well-founded concerns that these judges intervene or may intervene in trials, then turns the trial process into a legal mangle from the very beginning. For example, in the case in which I was on trial for allegedly marking Judge Akın Gürlek as a target, Gürlek himself was still an Assize Court judge and sent a letter to be added to the case file, claiming that I was "continuing to commit the offence". Gürlek, who was a "powerful Assize Court judge" at İstanbul's central Çağlayan Courthouse, had already decided that I had committed a crime! "Luckily" I was acquitted and Gürlek's conduct, which could be perceived as an "intervention", was ineffective, but the fact that he could do that is extremely dangerous, regardless of its impact on the result.

Court Cases as a Violation of the Right to Criticise and be Informed

Other journalists and human rights defenders such as Eren Keskin, Nazlan Ertan, Mansur Çelik, Derya Saadet, Yağmur Kaya, Rabia Çetin, Fırat Can Arslan, Dilan Balat, İsmail Saymaz, Gökçer Tahincioğlu, Furkan Karabay, Faruk Eren, Sibel Yükler, Delal Akyüz, Evrim Deniz, Evrim Kepenek, Yıldız Tar and probably many whose names we have omitted here have all been charged with this same offence. While a considerable number of trials against journalists under Article 6/1 of the Anti-Terror Law have ended in acquittals, it would be premature to conclude that there is no lingering risk of punishment or detention for journalists. In November 2023,

journalists **Ferhat Çelik** and İdris Yayla[10] were sentenced to 1 year and 3 months of imprisonment for the same offence of 'targeting an official'. Fırat Can Aslan[11] became the first journalist in Turkey to be arrested under Article 6/1 of the Anti-Terror Law. Although he was later acquitted at the first hearing, Aslan was held in pre-trial detention from July 2023 until the end of October 2023.

The common pattern in these proceedings is especially notable. In the case of Kurdish journalist Fırat Can Aslan, he, along with journalists Evrim Deniz, Sibel Yükler, Evrim Kepenek and Delal Akyüz)are currently facing trial for reporting on the trial of 18 journalists in the Kurdish capital of Diyarbakır. They reported the fact that the Prosecutor of the indictment in the case and the lead judge who heard the first hearing of the case were married. In a case of this importance, the fact that the prosecutor of the indictment and the person who would decide on the acceptance or dismissal of the indictment and then give judgement are married is obviously newsworthy.

In the case against human rights lawyer **Eren Keskin**[12] (and against journalists Nazlan Ertan[13] and Derya Saadet[14]), Keskin was accused of marking the prosecutor as a target for terrorist organisations on the grounds that Keskin stated that the investigation into the case of HDP (Peoples' Democratic Party) member Deniz Poyraz, who lost his life in the attack on the HDP building in Izmir, was not carried out effectively, and criticised the prosecutor who conducted this investigation for drafting an indictment in which the prosecutor characterised the words of Poyraz's father as terrorist propaganda. Even if Keskin and other journalists were acquitted in June 2023, this acquittal does negate the profound impact of the trial.

While there are more instances to consider, even the limited number of examples given here demonstrates that journalists in Turkey are discouraged from writing on certain subjects, from sharing factual information with the public, and that the aim of the trials has been to keep such information behind closed doors.

Criminal legislation in Turkey resembles a minefield for journalists. Hanging over the journalists, that sword of judicial threat naturally affects all aspects of social life. Journalism as a profession is directly related to the public's right to be informed, and the pressure and judicial harassment in this field has consequences for society at large. It is also concerning that in most cases analysed in this article, judges or prosecutors were the ones advocating for the penalisation of expressions safeguarded by both the Constitution of Turkey and the European Convention on Human Rights. Although it is often ignored in judicial practice in Turkey, the international codes of professional principles oblige both the prosecutors and judges to protect human rights.

The fact that there are many structural problems in the judiciary in Turkey and that there is therefore an urgent need for a structural transformation is currently a major topic of debate within various institutions. Any realistic democratic transformation should start by putting an end to the criminalisation of free expression.

Endnotes

1 mevzuat.gov.tr/mevzuatmetin/1.5.3713.pdf
2 On the Revision Policy (adalet.gov.tr)
3 Microsoft Word - Canan Coşkun_TİP_TR_Final-1.docx (norskpen.no)
4 14 lawyers of Nuriye and Semih arrested (cumhuriyet.com.tr)
5 Policeman alleged to have shot Berkin Elvan did not remember his place of duty (cumhuriyet.com.tr)
6 Canan Coşkun's tweet in question: https://x.com/canancoskun/status/1476280037406121988?s=20
7 The report: DIAYDER indictment based on 'anti-terrorism' inspection against Metropolitan Municipality of Istanbul accepted - Diken
8 Talented Mr. Judge (birgun.net)
9 Journalist Buse Söğütlü acquitted after 2 years and 7 hearings (bianet.org)
10 Court of appeal upholds sentences against journalists Çelik and Yayla for 'marking as targets' (mlsaturkey.com)
11 Journalist Fırat Can Arslan acquitted (gazeteduvar.com.tr)
12 Jail demand for Eren Keskin for "legally criticising the prosecutor" (bianet.org)
13 Journalist Nazlan Ertan charged with 'defamation' and 'marking as a target' for retweeting (mlsaturkey.com)
14 Journalist's 'retweet' acquitted (bianet.org)

PEN NORWAY

Legal Report on Indictment: **Ayça Söylemez**

Florian Bohsung

Ayça Söylemez is a journalist at BirGün newspaper, known for her reporting on human rights and the judiciary. She was accused of ""making a public officer into a target for terrorist organisations" after writing a critical article titled "Talented Mr. Judge" about several high-profile public trials handled by a single judge; she was acquitted.

Legal Report on Indictment: Ayça Söylemez

Author: Florian Bohsung

1. Introduction

This report discusses indictment No 2023/7513 against journalist Ayça Söylemez, issued by public prosecutor Burak Özer on the 14th of July 2023. The indictment charges Ayça Söylemez with marking Judge Akın Gürlek as a target for terrorist organisations based on her article 'Talented Mr Judge' from the 18th of February 2020.

The second part of this report will give a brief summary of the facts. The third part will analyse whether the indictment meets the standards laid out in Turkish domestic law, and under the European Convention on Human Rights (ECHR). In the conclusion some recommendations will be given on how indictments may be improved in the future.

2. Summary of the Case Background Information

On the 18th of February 2020, human rights editor, journalist, and columnist Ayça Söylemez published the article "Talented Mr Judge"[1] in the daily newspaper *BirGün*. In it she discusses multiple cases handled by today's Deputy Minister of Justice Akın Gürlek, who was president of the 37th High Criminal Court in Istanbul at the time. The cases Gürlek presided over and which are mentioned in the article regarded politicians and journalists such as Canan Kaftancıoğlu,[2] the former İstanbul provincial chair of the main opposition Republican People's Party (CHP), Selahattin Demirtaş, the imprisoned former co-chair of the Peoples' Democratic Party (HDP), Şebnem Korur Fincancı, the former chair of the Turkish Medical Association (TTB), lawyers from the Progressive Lawyers Association (ÇHD), the Academics for Peace, and executives, writers, and staff from Sözcü newspaper.

Crucially, in her article Söylemez explicitly mentioned Akın Gürlek by name and so almost five months after the publication of the article on the 13th of July 2020, Gürlek made a complaint against Söylemez, accusing her that she marked Gürlek as someone in charge of the fight against terrorism as a target for terrorist organisations and consequently, the public prosecution opened an investigation into the allegations. Following this, it took almost three years until Söylemez was asked to provide testimony during which she defended herself claiming that because of the cases Gürlek had handled he was a publicly known figure, and that she did not mention any illegal organisations. She stated:

> I wrote about the cases [Gürlek] handled and the verdicts given in those cases, which are already publicly available information. Therefore, it cannot be said that I made Akın Gürlek a target of any organisation. In conclusion, the mentioned column article is written entirely within the framework of my role as a journalist, with the sole purpose of informing the public and within the framework of freedom of the press and expression.[3]

Despite Söylemez highlighting that Gürlek had made similar allegations against journalists in multiple cases before, which were either not prosecuted or had led to acquittal of the accused, the prosecutor issued an indictment on the 14th of July 2023, which was accepted by the İstanbul 29th High Criminal Court ten days later. The indictment claims that Söylemez 'mentioned [Akın Gürlek …] by his name, and disclosed the cases he had handled in the course of his duty, that the content of the article subject to the investigation qualifies as marking individuals as targets and serving them to armed terrorist organisations as specified in Article 6 of Law No. 3713'.[4]

On 22 November 2023, Ayça Söylemez appeared before the Istanbul 29th High Criminal Court for the first hearing of her trial. Söylemez and her lawyer Güçlü Sevimli were present during the hearing. Her defence statement repeated what she had claimed during her testimony given to the police, saying that her article was covered by the right to freedom of expression, and that she had not disclosed any information that was not publicly available already.

In the closing statement, the prosecution requested that Söylemez was sentenced for 'marking a public official assigned with the fight against terrorism as a target.'

On the 19th of March 2024, the Court heard the closing arguments of the defence and subsequently decided to acquit Söylemez of all charges. This decision is reliving but it still remains that the indictment in itself should have never been written, or at least the Court should have never accepted it in this form.

3. Analysis of the Indictment

The first part of this analysis of the indictment against Ayça Söylemez focuses on the question whether it complies with the requirements under Turkish domestic law. Since Söylemez indictment closely resemble the indictment against Canan Coşkun which has been reported on by PEN Norway already, and the flaws are also the same, the analysis will only briefly summarize the issues and instead focus more on the parts that have not been raised in Coşkun's indictment instead. Additionally, the analysis will focus more on the jurisprudence under the ECHR.

3.1 Domestic Law

As already discussed in multiple other PEN Norway publications the Turkish Code of Criminal Procedure (CPC) requires under Article 170 that an indictment contains details about the alleged crime that could be linked with the incident in question, a definition of that crime together with its elements, the specific actions of the suspects that constituted the crime, the relationship between the evidence and the crime and finally, the exculpatory evidence. A text without such elements cannot be regarded as an indictment in the legal sense of the term, even if it contains an allegation.[5]

Article 170/3 CPC specifies the elements that every indictment must include. One of these requirements is that the representative or legal representative of the victim or the injured party is specified (Article 170/3-d CPC). The indictment fails to meet this requirement as only the legal representative of Söylemez is mentioned but not the one for Gürlek. Furthermore, the indictment fails to specify that Söylemez is not detained as it would be required under Article 170/3-k CPC. Finally, it is required that the date the complaint was made against the accused is mentioned in the indictment (CPC Article 170/3-g). In this case, the date is missing from the document. In fact, the indictment only mentions it as 'criminal complaint' as part of the evidence list. No additional information is given for it. Consequently, the indictment fails to meet the basic requirements of a legally valid indictment. Despite these shortcomings, the Court accepted the indictment and started hearing the case.

Similarly to the indictment against Coşkun, the indictment against Söylemez contains a short list of documents that are used as evidence against her. Namely these documents are considered 'Criminal complaint, open source research report, suspect's defence, criminal record, register

and the scope of the whole investigation document.' Just as in the case of Coşkun, the most critical piece of evidence, the Söylemez's own journalistic article is not listed. While this formality might be considered just a careless oversight since the article is quoted in its entirety in the indictment, the same cannot be said for the 'open research report' nor the 'investigation document' which are not referenced in the final indictment at all. In fact, the prosecutor does not even make an attempt to establish a clear and transparent connection between the alleged crime and the incident in question. After quoting the article in its entirety, and giving an excerpt of the statement made at the police station by Söylemez, the prosecutor continues to present extensive general information about the right to freedom of expression as guaranteed under Article 10 ECHR, as well as its limitations. A similar section for Article 6 of Law No. 3713 is missing. The prosecutor completely fails to link any of the information presented to the specific case of Söylemez. Instead, the prosecutor considers it as established that the defendant has committed the 'act of marking as a target Akın Gürlek, one of the people who has been fighting against terrorism under legal protection.'[6] As such, it must be considered that the indictment fails to present the definition of the crime and its elements, since no explanation of Article 6 of Law No. 3713 nor any jurisprudence around it is given, and instead provides only an explanation why Article 10 ECHR may be limited in some cases. Furthermore, the indictment does not show which specific action, or in this case, specific sentences/paragraphs, mark Gürlek as a target for a terrorist organisation. Thus, it fails to show which specific actions are the crime Söylemez is accused of. Finally, it cannot be said that the evidence presented is in relation to the crime, as outlined above.

"The indictment does not show which specific action, or in this case, specific sentences/ paragraphs, mark Gürlek as a target for a terrorist organisation. Thus, it fails to show which specific actions are the crime Söylemez is accused of. Finally, it cannot be said that the evidence presented is in relation to the crime, as outlined above."

Under Article 170/5, the prosecution is required to present not only evidence against the accused but also evidence in favour of them. In the present case, the evidence presented in favour of Söylemez is only the defence statement she provided herself. No additional exculpatory evidence is mentioned. While it makes sense to include the suspects own words in the indictment, it is not sufficient to be in adherence of Article 160 CPC which requires the prosecutor to 'collect and secure evidence in favour and in disfavour of the suspect'. It is further detailed in the justifications of the legislator that the prosecutor should put equal effort into investigating fact in favour and against the effort. From the indictment of Söylemez it can be concluded that no time was spent on exculpatory evidence. The only time that it is mentioned that Söylemez is a journalist and that she was reporting on public hearings of a publicly known judge, is in her own testimony. In her own testimony Söylemez also mentions that she is aware of similar cases against journalists that covered the work of Gürlek and that they ended in either terminations of the investigations or in the acquittal of the accused. Since she was not informed of the accusations against her, she did not have the chance to bring them to the police station, but she would provide the office of the prosecution with copies of these decisions. None of these decisions with precedent value are mentioned as exculpatory evidence in favour of Söylemez. Failing to include such crucial evidence, especially after Söylemez pointed the prosecutor directly at it,

seems to suggest that the prosecution did not take into consideration any evidence in favour of the accused. As a reminder, the UN Guidelines on the Role of Prosecutors underline the duty of prosecutors to terminate investigations when it becomes clear that an accusation is unfounded.[7] Additionally, Article 160 CPC requires that the prosecutors establish the 'factual truth', that they 'secure a fair trial', and 'protect the rights of the suspect'. At this point the handling of the case by the prosecutor gives rise to the question of whether these safeguards for the rights of the accused have been observed.

Before turning towards issues under international law, one more procedural issue with the indictment against Söylemez needs to be raised regarding the Turkish Press Law (TPL). It stipulates in Article 26: 'It is essential that cases of crimes entailing the use of printed matter or other crimes mentioned in this law should be opened within a period of four months for daily periodicals and six months for other printed matter.' Since the article was published both in a daily periodical and on the website of *BirGün*, in this case the six-month period may be applied. In Turkey every news outlet should send all printed publications to the Office of the State Chief Prosecutor (OSCP), at which point the six months period is starting. Even if in Söylemez case the article was not sent to the OSCP, Article 26 TPL further states that 'If the material is not submitted, the beginning date of the above-mentioned periods is the date when the OSCP ascertains the action which constitutes the crime.' This means, at the latest, the OSCP became aware of the alleged criminal article when Gürlek made his complaint on the 13th of July 2020. Consequently, the Court should have opened a case against Söylemez on the 13th of January 2021 by the latest. Instead, the indictment was issued on the 14th of July 2023 and the court case opened on the 24th of July 2023. Since the change of the TPL in December 2022, news portals like *BirGün* are explicitly subject to this law, and therefore it applies in this case. This means, that the prosecutor, irrespective of the content of the indictment, failed to issue the indictment in time and should have abstained from doing so. Consequently, the Court should not have accepted the indictment against Söylemez either.

From the forgoing, it is clear that the case against Söylemez fails to meet the procedural standards under Turkey's domestic law. The prosecution failed to issue an indictment containing basic information required by law. It furthermore failed to include exculpatory evidence. Finally, it failed to meet the time limitations. With all of these errors the High Criminal Court should have rejected the indictment but failed to do so and opened the case against Söylemez.

3.2 ECtHR Jurisprudence

Under the ECtHR the case of Söylemez may give rise to multiple violations. The procedural errors mention above may give rise to a violation of the right to a fair trial under Article 6 ECHR. Additionally, the merits of the case may give rise to potential violations of Article 10 ECHR, the right to freedom of expression and the included right to freedom of press.

3.2.1 Article 6 – The Right to a Fair Trial

As has been found in previous reports of the PEN Norway Indictment Project[8], an indictment which does not comply with Article 170 CPC cannot possibly be in compliance with Article 6 of the ECHR. Specifically, Article 6/3-a requires that the accused receives 'detailed' information about the 'nature and cause of the accusation against them.' While the European Court of Human Rights (ECtHR) has held in *Pélissier and Sassi v. France* Article 6/3-a does not have any formal requirements,[9] but the Court also clarified that 'in criminal matters the provision of full, detailed information concerning the charges against a defendant, and consequently the legal characterisation that the court might adopt in the matter, is an essential prerequisite for ensuring that the proceedings are fair.'[10] While derogations from some of the rights laid out in the ECHR are permissible, they always need to be required by law, necessary in a democratic society, and have a legitimate aim mentioned under Article 6. As it has been established in the Section 3.1 of this report, the indictment fails to fulfil the requirements laid out under Article 170 CPC. Therefore it is clear that 1) the right to a fair trial has been infringed, and 2) the infringement was not required by law. Consequently, the indictment against Söylemez is in violation of Article 6 ECHR.

3.2.2 Article 10 – The Right to Freedom of Expression

Article 10 ECHR reads: 'Everyone has the right to freedom of expression.' The right itself derives from freedom of thought and as such is, as the indictment proclaims, 'one of the fundamental conditions for the progress in democratic societies'. Over three paragraphs the indictment continues to explain that the right to freedom of expression means that 'individuals should be able to use all verbal, graphical, written and game-like means of communication. Because this freedom is not only a personal right; it is also a social right.' However, immediately after making such claims, the prosecutor claims that 'granting the individuals the freedom to destroy freedom can kill democracy'. If freedom of expression were to be completely unchecked, it would allow for 'people with different political views [… to] naturally endeavour to convince, steer and win over those who do not have a clear political view, which would lead to a conflict of interest between opposing views.' As a result, the prosecutor sees that anarchy would disrupt the public order, and consequently the institutional framework would be in danger. The prosecutor then considers that because it is possible to limit the freedom of expression it is proven that the Söylemez article mentioning Gürlek is marking him as a target for terrorist organisations, without any explanation of why the specific piece would not fall under the freedom of expression.

The foregoing line of argumentation raises multiple questions. Firstly, it seems that the prosecutor has an interpretation of democracies that deviates wildly from the common understanding of the concept. Secondly, and more importantly, there is no clear connection between explaining possibilities to limit the right to freedom of expression under some conditions and considering the accusation against Söylemez as proven. The remainder of this report will assess whether the Söylemez article should have been covered by the right to freedom of expression under Article 10 ECHR, in connection with Article 6 of Law No. 3713.

The first question that has to be checked, is whether there has been an interference with Article 10 of the ECHR. Without a doubt, criminalizing a news article must be considered an interference with the right to freedom of expression. As such, to establish whether there is a violation of Article 10 ECHR it must be checked whether the interference is required by law, it pursues a legitimate aim, and whether the interference is necessary in a democratic society.[11]

3.2.2.1 Interference Required by Law

The prosecutor deems it proven that by mentioning Gürlek by name, Söylemez marked him as a target for terrorist organisations. As such, her article would fall under Article 6 of Law No. 3713 and consequently an interference would be required by law. However, as mentioned before, the indictment fails to explain how the article falls within the scope of Article 6 and which parts specifically mark Gürlek as a target. Additionally, the indictment fails to mention for which terrorist organisations in particular Söylemez marked Gürlek as a target. Finally, the indictment does not provide any evidence that Gürlek, as a judge, must be considered a person involved in the fight against terrorism. Since the names of judges are readily available on the internet, it is unclear what information Söylemez published, that was not already public. Therefore, there is no convincing argument in the indictment that the news article fulfils all the elements of Article 6.

Independent from the missing argumentation of the prosecution, Article 6 of the Anti-Terrorism Law needs to satisfy the tests that it is sufficiently precise to enable someone to understand that a given conduct falls within the scope of the law. Additionally, the consequences of such actions will need to be sufficiently foreseeable.[12] Otherwise, the article may not be considered 'law' within the meaning of Article 10 ECHR.

PEN Norway has recently published an article[13] on Article 6 of Law No. 3713 showcasing how the vagueness of the article contributes to journalists increasingly being targeted by public prosecutors. Importantly though, every case that has been brought against journalists so far under Article 6 of the Anti-Terrorism Law has, as mentioned before, either not been prosecuted, or has ended in the acquittal of the accused. Therefore, besides potentially failing the precision test, it cannot be said that the practice of the courts has made sure that the consequences of publishing an article regarding a judge are sufficiently foreseeable. This means that, while the

national courts have a margin of appreciation in how they apply domestic laws, it seems highly unlikely that the ECtHR would come to the conclusion that Article 6 of Law No. 3713 requires an interference in the given case. Thus, it is highly likely that the Court will identify a violation of Article 10 ECHR. While it would therefore not be necessary to check the remaining tests of legitimate aim, and necessity in a democratic society, this report will briefly discuss them to have a complete picture of the legal situation.

3.2.2.2 Legitimate Aim of Interference

Article 10/2 ECHR provides an exhaustive list of possible aims that are compatible with which authorities may justify an interference. In Özgür Gündem v Turkey the Court accepted that Section 6 of Law No. 3713 of 1991 (the precursor of the current Law No. 3713) may pursue the legitimate aims of protecting national security and territorial integrity and of preventing crime and disorder.[14] While the wording of the current Article 6 of Law No. 3713 has changed slightly, it is not so significantly different that a different interpretation by the Court is likely. In the case of Söylemez it may additionally be argued that the aim of maintaining the authority and impartiality of the judiciary could constitute another legitimate aim. However, having a legitimate aim in itself is not sufficient but the interference must also be necessary in a democratic society to not be a violation of Article 10 ECHR, which will be discussed in the final section.

> "It is clear that the case against Söylemez fails to meet the procedural standards under Turkey's domestic law. The prosecution failed to issue an indictment containing basic information required by law. It furthermore failed to include exculpatory evidence. Finally, it failed to meet the time limitations. With all of these errors the High Criminal Court should have rejected the indictment but failed to do so and opened the case against Söylemez."

3.2.2.3 Necessity of an Interference in a Democratic Society

For this final test, two aspects should be highlighted:
1) Söylemez is a member of the press and as such has a special status with regards to the right to freedom of expression and
2) Gürlek's role as a judge and a 'public official in the fight against terrorism'.

The indictment does not take into consideration at any point that Söylemez wrote and published the article as a member of the press. Article 10/1 of the ECHR explicitly states that the right to freedom of expression includes the right to 'impart and receive information'. The ECtHR has held in multiple instances that:

> Subject to paragraph 2 of Article 10, it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society'.[15]

While the Court considers that journalists are not released from their duty to adhere to the applicable laws, it clarified that the margin of appreciation given to the authorities is limited if they are dealing with members of the press due to their role as 'watchdogs' of their respective governments.[16] The Court recognizes that convictions against journalists may have

significant effects to discourage members of the press from informing the public on matters of public interest, and thus preventing the press from fulfilling this role.[17] In this regard the Özgür Gündem judgement[18] must be highlighted, in which the Court ruled that the interest to protect the identities of people involved in the fight against terrorism is significantly decreased, if these people are public figures or their names are already publicly available, since the potential harm would be minimal. In such a case, it cannot be considered that there are justified grounds under Article 10/2 ECHR to place criminal sanctions on journalists and limit their right to freedom of expression and disseminattion of information.[19] Since Gürleks name and his role as judge at the High Criminal Court was publicly available, and Söylemez was reporting on hearings which were held publicly, it cannot be said that there was a pressing social need to interfere with Söylemez' right to freedom of expression.

> As member of the judiciary, Gürlek does not have a right to be anonymous. Such a development would be a gross violation of the right to a fair trial and also be a clear sign of a failing democracy. Söylemez's article highlighted that members of the judiciary may not operate with complete impunity.

Next to this it also must be mentioned that Söylemez only criticised the work of Gürlek as a judge, and not Gürlek as a person. In his official capacity as a judge (and thus as an integral part of the judiciary) he has to accept that criticism against him may have wider limits than criticisms of ordinary citizens.[20] While the judiciary must be protected against gravely damaging attacks that are essentially unfounded, questions regarding the functioning of the judiciary must be considered to be of public interest.[21] As such, Söylemez not only had the right of freedom of expression to voice her criticism but also the public has a right receive this information. The Court has furthermore held that Member States have a narrow margin of appreciation to limit the freedom of expression, where measures may discourage the press from participating from debates concerning a legitimate public interest.[22] It is clear that assuming Gürlek's work may not be scrutinised, simply because as a judge he can be considered a public official in the fight against terrorism, and he could be targeted by a terrorist, falls outside the margin of appreciation granted to the Member States. As a judge, Gürlek may, and should, benefit from being protected from attacks against his person to ensure the independence and objectivity of the judiciary. However, by becoming a judge he accepted that his name and his judgments would be publicly accessible and that his work might make him a target. As member of the judiciary, Gürlek does not have a right to be anonymous. Such a development would be a gross violation of the right to a fair trial and also be a clear sign of a failing democracy. Söylemez's article highlighted that members of the judiciary may not operate with complete impunity.

From the forgoing it can be concluded that the interference with Söylemez's right to freedom of expression was not necessary in a democratic society. Consequently, this test also results in a violation of Article 10 ECHR.

4. Conclusion and Recommendations:

As this report has shown, the indictment against Söylemez not only fails to meet the minimum legal procedural requirements,

but also does not provide any reasons that prove beyond a reasonable doubt that Söylemez fulfilled the legal elements of the crime marking public officials in the fight against terrorism. The complete lack of any legal reasoning raises serious questions about the professional qualification of the prosecutor. Furthermore, the fact that a court accepted the indictment in this form indicates an eroding legal system which is no longer considering basic legal principles, like the assumption of innocence, the right to a fair trial, and upholding and defending human rights like the freedom of expression.

Considering that Gürlek has brought similar accusations against other journalists in the past, the accusation as well as the indictment may be interpreted as a deliberate attempt to limit the freedom of expression of the press by intimidating journalists who are reporting on the misuse of power. Courts should not be complicit in such attempts but be the defenders of a free press, rejecting indictments that have no legal basis. This also highlights that Turkey must improve the selection criteria for judges and public officials and only select those that are of impeccable character. The dangers of giving powers of the judiciary to officials that may not respect their duties and are unable to show restraint cannot be underestimated.

This indictment also demonstrates the clear need to improve the quality of training of all branches of the judiciary. A public prosecutor who is unable to adhere to basic procedural requirements, like Article 170/2 CPC, and more importantly, who initiates proceedings without sufficient suspicion that a crime has been committed is a clear indictor for subpar training.

Most importantly, this indictment is another reminder that Turkey arbitrarily targets journalists who are critical of the political and judicial climate. It is recommended that Turkey starts respecting freedom of expression, the freedom to disseminate information, and the right to receive information. A democratic system must guarantee the free exchange of ideas and thoughts. Only in this way can it be strong and can it benefit society. This means Turkey must do everything in its power to stop attacks against freedom of speech and attacks against its journalists. Ultimately, the acquittal of Söylemez on the 19th of March 2024 is welcomed. Nevertheless, Söylemez should never have been in this situation and should never have been accused.

Endnotes

1 Birgün Gazetesi, “Yetenekli Hâkim Bey,” Birgün Gazetesi, February 18, 2020, accessed February 28, 2024, https://www.birgun.net/makale/yetenekli-hakim-bey-288416.
2 His indictment has been analysed by Pen Norway in 2021: Şerife Ceren Uysal, “Legal report on indictment: Canan Coşkun,” PEN Norway Turkey Indictment Project (Pen Norway, 2021).
3 See: Gazeteci Ayça Söylemez’e “hedef gösterme” davası (bianet.org)
4 See: Indictment against Ayça Söylemez
5 See for example: Şerife Ceren Uysal, “Legal report on indictment: Hikmet Kumli Tunç,” PEN Norway Turkey Indictment Project (Pen Norway, 2021), 5–6; Uysal, “Legal report on indictment: Canan Coşkun,” 5.
6 See: Indictment against Ayça Söylemez
7 Guidelines on the Role of Prosecutors, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders Principle 14 (07 September 1990).
8 Uysal, “Legal report on indictment: Hikmet Kumli Tunç,” 13.
9 Pélissier and Sassi v. France, para 53 (European Court of Human Rights March 25, 1999).
10 Id., para 52.
11 This test is laid out in Article 10/2 ECHR
12 Öztürk v. Turkey, para 54 (European Court of Human Rights September 28, 1999).
13 Şerife Ceren Uysal, “Turkey’s journalists in the firing line for ‘targeting officials’” (Pen Norway, 2023).
14 Özgür Gündem v. Turkey, para 56 (European Court of Human Rights March 16, 2000).
15 Stoll v. Switzerland, para 101 (European Court of Human Rights December 10, 2007).
16 Id., para 102, 105.
17 Id., para 110.
18 Özgür Gündem v. Turkey.
19 Id., para 65.
20 July and Sarl Liberation v. France, para 74 (European Court of Human Rights February 14, 2008).
21 Morice v. France, para 128 (European Court of Human Rights April 23, 2015).
22 July and Sarl Liberation v. France at para 67.

PEN NORWAY

Legal Report on Indictment: **Fırat Can Arslan**

Heidi Heggdal

Revealing that the prosecutor indicting 20 journalists was married to the judge who accepted the case sparked public outrage and led to their reassignment. Mezopotamya Agency reporter Fırat Can Arslan was detained and tried for "making a public official a target for terrorist organisations" over a social media post about the affair—but was ultimately acquitted.

Legal Report on Indictment: Fırat Can Arslan

Author: Heidi Heggdal

1. Introduction

This report assesses the 3-page indictment with the investigation no 2023/56271 and indictment no 2023/2732 issued by Ahmet Faruk Karakuş, the Public Prosecutor of the Chief Public Prosecutor's Office of Diyarbakır, against journalist Fırat Can Arslan.

2. Summary of Case Background Information

Fırat Can Arslan (hereafter referred to as Arslan) is a journalist who works as a correspondent at Mesopotamia News Agency. He is a member of International Federation of Journalists.

An investigation launched by the Chief Prosecutor's office of Diyarbakır in June 2022, resulted in the arrest of 18 Kurdish journalists, 15 of whom remained in pre-trial detention until July 2023. On 24 March 2023, all 18 journalists were indicted for 'being a member of a terrorist organisation'. The first two hearings took place on 11 and 12 July 2023. The hearings were public and observed by several media, journalist and human rights organisations, including PEN Norway.[1]

During the hearing on 11 July 2023, it was revealed that prosecutor Mehmet Karababa, at the Diyarbakır Terrorism Crimes Investigation Bureau, who prepared the indictment against the journalists, is married to the presiding judge Seda Karababa at the Diyarbakır 4th Heavy Penal Court, who approved the indictment. On 17 July 2023, by a decree of the Council of Judges and Prosecutors (HSK), Mehmet and Seda Karababa were assigned to Vezirköprü Courthouse. The decree was published according to normal procedure.

On 18 July 2023, Arslan posted the following tweet:

> *'It has been revealed that the prosecutor Mehmet Karababa, who prepared the indictment of the journalists detained for 13 months, and his wife, the member judge Seda Karababa in the court panel, have had their duty locations changed! The Karababa couple, who were found to be married during the hearing on July 11, have been assigned to Vezirköprü…'*

Because of this tweet, Arslan was arrested on 25 July 2023 on the allegation of committing the crime of 'Targeting Public Officials Fighting Terrorism' according to Article 6/1 of the Anti-Terror Law (TMK). He was placed in pre-trial detention because of alleged 'flight risk'. Arslan was kept in solitary confinement during the entire pre-trial detention period.

Delal Akyüz, a journalist from Mesopotamia News Agency who retweeted and shared Arslan's tweet was detained the same day. The editors Sibel Yükler (T24) and Evrim Kepenek (Bianet) and journalist Evrim Deniz was also detained on 25 July. All four were released and imposed to judicial control measures after giving statements to the prosecutor.

Arslan's appeal against the arrest dated 31 July 2023 was denied by the court on 9 August 2023. During the regular detention review on 21 August 2023, the court decided to prolong the detention. The indictment was prepared on 25 September 2023 and accepted by the court. At the first hearing, held on 31 October 2023, Arslan was acquitted and released from prison. The court found that no crime was committed.

3. Analysis of the Indictment

3.1 Evaluation of the Indictment Under Turkish Law

The Turkish Code of Criminal Procedure (CPC) Article 170 regulates the duty of the public prosecutor and the formal content of an indictment.

CPC Article 170/3-a-k) describes mandatory formalities of an indictment. The conclusion is that the indictment against Arslan conforms to these formalities.

In the introductory part, the indictment contains the identity of the suspect, the names of the defence counsels, the identity of the victims, the date and place of the offence, date of detention and arrest and that the arrest was according to a warrant, the crime charged and the applicable articles in the law and finally a list of evidence. In addition, it is informed that the indictment involves a detainee. The complainant is described as 'Public Law', which indicates that the criminal investigation was initiated by the prosecution and not by a criminal complaint by the 'victims'. This is within the duty of the prosecutor, unless otherwise is stated in the law. Hence, it is assumed that the investigation started on 21 July 2023, which is the date of the investigation report. Both the identity of the claimant (170/3-f) and the date of the claim (170/3-g) can then be read out of the indictment.

The descriptive part of the indictment starts with a detailed description of the organisation PKK (the Kurdistan Workers' Party), later named KCK (Kurdistan Democratic Communities Union), with the history, development and an explanation why this organisation is regarded as a terrorist organisation. It is unnecessary to give such a detailed description of PKK/KCK and in addition, it gives an impression of the indictment being biased. It is the duty of the prosecutor to have a neutral and objective approach when investigating crimes, see CPC Article 160, which describes the duty of the prosecutor. See also CPC Article 170/4 where it is clearly stated that information that is irrelevant to the events constituting the alleged offence and the evidence of the offence shall be excluded.

According to CPC article 170/4 the events that comprise the charged crime shall be explained in the indictment in accordance to their relationship with the presented evidence.

The description of the 'Arrested Journalists Case', with the number, content and approval of the indictment of the journalists, in the first paragraph under the headline 'Regarding Suspect Fırat Can ARSLAN', seems initially reasonable objective and gives relevant background information to explain the events that comprise the charges, in line with the requirements in CPC Article 170/4. As mentioned above, this is the case where the prosecutor Mehment Karababa prepared the indictment that was approved by a panel of judges in which the prosecutor's wife, Judge Seda Karababa, was a member. However, the description of this case could have been shorter and the prosecutor should have refrained from describing the media organisations as *'the media structure of PKK/KCK*'. Furthermore, the last sentence *'…are reported in the news as "Arrested Journalists" by the press and media organs affiliated with the terrorist organisation*, gives the impression that only certain media organisations, allegedly affiliated with PKK/KCK, refers to the case as a case against arrested journalists. This is simply not true, as the trial is widely reported on both by national and international media in addition to human rights NGOs as a case of arrested journalists. These descriptions might seem to be minor flaws but when read in connection with the initial long description of PKK/KCK, the impression is that objectivity is lost in this indictment.

The next paragraphs quote the tweet posted by Arslan, describes the connections of the Karababa couple to the 'Arrested Journalists Case' and the 'Decree from Council of Judges and Prosecutors' on the transfer of the Karababa couple. In this part, the indictment is in line with CPC Article 170/4. The description explains the relevant facts and its connection to the evidence (the tweet) mentioned in the indictment. However, as the analysis below will show, no crime is committed.

According CPC Article 170/5 the conclusion section of the indictment shall include not only the issues that are disfavourable to the suspect, but also the issues in his favour. In the indictment, it is mentioned that Arslan and his defence counsels have claimed that Arslan posted the 'Decree of the Council of Judges and Prosecutors' as it was and that this act should be considered to fall within the scope of freedom of press. After the description of Arslan's defence, it is written in the indictment that the decision of HSK contains names, surnames, current working place and the new place the Karababa couple is assigned to. This could indicate that the prosecutor understands the importance of the fact that that the information in the tweet has already been published. Unfortunately, the rest of the indictment bears no signs of a valid legal assessment.

"This could indicate that the prosecutor understands the importance of the fact that that the information in the tweet has already been published. Unfortunately, the rest of the indictment bears no signs of a valid legal assessment."

The description in the indictment continues as follow:

> *Not included in the decree is the information on the investigations carried out by the prosecutors or the cases in which the judges were a member of the judicial panel.*

Not a word about the fact that this information was also made public before the tweet, as it was revealed in a public hearing in the 'Arrested Journalist Case' and reported on by several media. If it was recognised by the prosecutor that Arslan had only shared information that was already published, the prosecutor would know there was no crime committed.

In the part where the prosecutor tries to connect the tweet to the crime regulated in TMK Article 6/1, the indictment becomes increasingly confusing with a legal assessment so weak that it is hard to believe that a state prosecutor is behind it. TMK Article 6/1 is problematic on many levels. For the analyses of the indictment against Arslan, however, it is not necessary with a broader analysis of this Article.

TMK Article 6/1 is quoted in the indictment and the following sentence is underlined:

> *(…) or those who disclose or publish the identities of state official that were assign in fight against terrorism,*

Arslan seems to be charged with the offence of having disclosed the names of state officials that fights terrorism. The action that allegedly is a crime punishable by TMK Article 6/1 is described like this*:*

> *The content of the suspect's post intended to form a certain perception among the members or sympathisers of the PKK/KCK terrorist organisation, and clearly stated the name and surname information and the new offices of the Public Prosecutor and the Judge who are in charge of the investigation file and of the trial phase respectively of the file known as "Arrested Journalists" by the press and media organs that are affiliated with the terrorist organisation.*

In other words; Arslan is accused of the intention *'to form a certain perception among member or sympathisers of the PKK/KCK…'* What perception did Arslan intend to form? That is not specified. In addition, it is not a crime to create a perception. At least not a crime regulated in TMK Article 6/1 in the Counter-Terrorism Law. This first part of the description of the alleged crime, does not make any sense. The alleged action simply does not fit the offence described in TMK Article 6/1.

It does not get any better with the second sentence, where the prosecutor presents the following conclusion:

> *[It is also understood that] In this way the suspect's act extended beyond simply informing the public and caused the information about the judges and prosecutors working within the scope of the relevant investigation and trial file to be known by the PKK/KCK armed terrorist organisation and by the members of the organisation against whom accusations and allegations are made in the files they [the prosecutor and the judge] have been dealing with, and thus caused public officials serving in the fight against terrorism to be targeted.*

Arslan is accused of going beyond simply informing the public and caused the information about the Karababa couple to be known by PKK/KCK. This accusation has no place in a serious legal document.. The information in the tweet was already published, both the new assignment of the Karababa couple and their work with the 'Arrested Journalist Case', hence whoever had an interest in the 'Arrested Journalist Case', was informed of the roles of the Karababa couple.

The following allegation, that this information caused public officials serving in the fight against terrorism to be target is totally unfounded. According to TMK Article 6/1 the offence is *to identify such persons as targets*. This is something else than *cause such persons to be targeted*. Maybe the difference is minor, and lost in translation. However, an explanation of how Arslan's tweet caused the Karababa couple to be targeted is missing. The prosecutor does not even attempt to connect the alleged crime to offenses regulated in TMK Article 6/1. In addition, there is not mention of criminal intent. Did Arslan intent to identify the Karababa couple as targets? As repeatedly described in this analysis, the information about the couple was already published and obviously of public interest.

In addition, it should be mentioned that prosecutors and judges are not *'public officials serving in the fight against terrorism.'* The job of prosecutors and judges is to achieve justice through objective investigation of crimes and fair trials, not to fight against any groups. If their objectivity, neutrality and/or independence is questioned, this information is of public interest and reporting it serves to ensure justice.

According to CPC article 170/2 the prosecutor should only prosecute in cases where, at the end of the investigation phase, collected evidence constitute sufficient suspicion that a crime has been committed. Clearly, the analyses above show that there was no sufficient suspicion against Arslan for any criminal offense. Furthermore, the indictment is not in line with CPC Article 170/5, as it not objectively include issues that are in favour of Arslan, especially the fact that the information in the tweet was already published.

The conclusion is that this indictment is seriously flawed and not in line with CPC article 170. The impression is that the prosecutor stretches Article 6/1 in an attempt frame Arslan for a crime that does not exist. It is nothing less than tragic that Arslan was kept in pre-trial detention, in solitary confinement, for 100 days based on this indictment. Not only has the prosecutor totally failed his duty, but the judges in the court who approved the indictment and found grounds for pre-trial detention for this period have also failed to give Arslan a fair and just treatment.

The conclusion that the indictment is not in line with Turkish law is shared by Diyarbakır High Criminal Court who acquitted Arslan on 31 October 2023. The court concluded that based on case laws from the ECtHR and the Court of Cassation, the defendant's actions were within the bounds of press freedom and did not constitute a criminal act. In the merits the court acknowledged that the identity of the involved individuals was publicly accessible, and the defendant's post was intended to inform the public. All consistent with the principles of freedom of expression and information. The decision of the Diyarbakır Hight Criminal Court is the only light in the tunnel in the case against Arslan.

3.2 Evaluation of the Indictment Under International Standards

The Turkish Code of Criminal Procedure (CPC) Article 170, regulating how to write an indictment is actually a very good template. If followed to its letter, the indictments would have met international standards.

Turkey has ratified the ECHR and according to the Constitution of Turkey article 90, ratified international law is taking precedence over national law. This means that if ECHR is violated, so is the Turkish Constitution.

The relevant international standards for this indictment is ECHR Article 6 "Right to fair trial" and article 10 "Freedom of Speech", United Nations Guidelines on the Principles Concerning the Role of the Prosecutors.

The indictment does not comply with the right to fair trial enshrined in ECHC Article 6 'Right to fair trial'. The indictment is biased and the prosecutor attempt to prove a crime that is not there. Arslan is not presumed innocent, as prescribed in Article 6. There is also serious doubts about the independence of the court that approved the indictment and found grounds for pre-trial detention based on such a weak indictment.

According to the 2021 statistics of the ECtHR in their annual activity report published on 25 January 2022, Turkey ranked highest for violating the right to freedom of expression. It was responsible for almost a quarter of all applications concerning freedom of expression (9,548 out of 44,250 applications in 2021. However, the freedom of speech and freedom of press are clearly enshrined in the Turkey's Constitution. And theConstitution is in line with ECHR article 10 that states that everyone

> *has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.*

In the *Lingens* judgment (July 1986), the European Court of Human Rights rules as followed:

> *Whilst the press must not overstep the bounds set, inter alia, for the "protection of the reputation of others", it is nevertheless incumbent on it to impart information and ideas on political issues just as on those in other areas of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them*

There can be no doubt that Arslan's tweet was within the scope of the freedom of expression and the freedom of press. So why did Arslan get arrested for posting this tweet? The fact that Arslan was subjected to the pretrial detention despite there clearly having been no crime committed indicates that this might be one of the cases where the prosecutor overstepping the bounds of the law and acting out of possible anger, a wish for retribution or wish to send out messages to other journalists that would result in a chilling effect upon their work. This is an abuse of power and not in line with neither Turkish law, nor international standards regarding the role of the prosecutor.

According to CPC article 160/2 the prosecutor is obliged to collect and secure evidence in favor and in disfavor of the suspect and *to protect the rights of the suspect.* Instead of protecting the rights of the suspect, the prosecutor in this case violated Arslan's basic rights.

The United Nations Guidelines on the Principles Concerning the Role of Prosecutors[2], Article 10 to 20, outline the role of the prosecutors in criminal procedures. According to Article 12 the 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.*

The prosecutor in the case against Arslan did not perform his duties in line with these requirements. The indictment and the process against Arslan was not fair and balanced and violated both the rights to fair trial and freedom of speech.

UN Guidelines Article 13 (a) stated 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;*

It seems apparent that the reason for the criminal prosecution of Arslan is purely political and part of the ongoing fight against journalists and freedom of speech that the Turkish Government has carried out for decades. The indictment is fact a result of political discrimination, and as Arslan himself stated in his defence: 'It was journalism, and not him, that was on trial'.

According to UN Guidelines Art 13 (b) 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;*

The prosecutor did not assess Arslan's defence. He did not take in to consideration the fact that Arslan's tweet reported on public information and did not include any personal commentary or criticism. Instead, the prosecutor speculated on Arslan's intent and charged him with a non-existent crime. This performance of the prosecutor is also in violation of the standards established in 1995 by the International Association of Prosecutors. These standards intend to ensure 'fair, effective, impartial and efficient prosecution of criminal offences' in all justice systems.[3] 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.' Instead of protect the public interest, and ensure fair and impartial prosecution, the prosecutor initiated a criminal procedure against an innocent man.

The overall conclusion is that the indictment against Arslan has no legal base, according to neither Turkish law, nor international standards. This is so obvious that it must have been apparent

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for the prosecutor. Consequently, the prosecutor has not performed his duty in a fair and impartial manner, but rather shown poor judgement and a fundamental lack of professionalism. As a result, Arslan was in pre-trial detention and in solitary confinement for 100 days without a legal base. This is the real crime here.

4. Conclusion and Recommendation

As many of the other indictments that have been evaluated in this project, this indictment should not have been issued. No crime has been committed. The indictment is constructed to appear to fulfill the formal requirements according to Turkish CPC, but the prosecutor fails to connect the actions of Arslan to the alleged crime. It does not seem likely that a prosecutor did not know that the tweet was within the scope of freedom of the press. It is fair to assume that the prosecutor wanted to intimidate and silence Arslan.

In previous recommendations in this project, it is mentioned that the prosecutors should follow CPC Article 170 down to the last letter, as this article in fact gives a good guidance on how to write indictments. This recommendation is still valid. However, when the aim of the prosecutor is mainly to censor the press and intimidate journalists from doing their job, the indictments will never be in line with neither Turkish law, nor international human rights standards.

It is not only the prosecutor who is to blame here. The court approved the indictment and the prosecutor's request for pre-trial detention, even if the judges must have understood that the tweet was not a crime. This shows that there is no protection for journalists against persecution and arbitrary arrest, even if freedom of the press is enshrined in the Turkish Constitution. Hence, the work of the prosecutors is very important, as they are the ones who initiate criminal procedure. On the positive side, the judges that acquitted Arslan, had a sound legal assessment of the indictment and the actions of Arlsan. Not only in regards to Turkish law, but also in relation to international human rights standards.

In addition to train prosecutors in how to write indictments, there seem to be a need for knowledge of the role of the prosecutor. A recommendation is therefore that the CPC on the prosecutors role and the more detailed recommendations in the United Nations Guidelines on the Principles Concerning the Role of Prosecutors should be implemented in the training of prosecutors.

Endnotes

1 https://norskpen.no/eng/pen-norway-observes-kurdish-media-case/

2 https://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfProsecutors.aspx

3 https://www.iap-association.org/getattachment/Resources-Documentation/IAP-Standards-(1)/IAP_Standards_Oktober-2018_FINAL_20180210.pdf.aspx

Istanbul Bar Association Under Threat!

Interview with Lawyer Ezgi Şahin Yalvarıcı, member of the Istanbul Bar Association director's board

Background:

The case concerning the President of the Istanbul Bar Association, Prof. Dr. İbrahim Kaboğlu, and the Bar Association Board members Rukiye Leyla Süren, Hürrem Sönmez, Ahmet Ergin, Metin İriz, Mehmedali Barış Beşli, Yelda Koçak Urfa, Fırat Epözdemir, Ezgi Şahin Yalvarıcı, Ekim Bilen Selimoğlu, and Bengisu Kadı Çavdar, heard at the Istanbul 2nd Civil Court of First Instance, was concluded in March 2025. The court, citing a written statement made by the Istanbul Bar Association, ruled for the dismissal of the board on the grounds that it had acted outside the scope of its authority.There is also an ongoing criminal investigation against Kaboğlu and other board members with charges of "terrorism propaganda via press" and "misleading the public by spreading false information via press" and additionally one of the Bar's, Lawyer Fırat Epözdemir, has been imprisoned since January 23, 2024, due to another investigation.

PEN Norway has been closely monitoring the legal proceedings faced by the elected board members of the Istanbul Bar Association, which has nearly 65,000 members, since the beginning. As a professional organisation, protecting the freedom of expression and the right to participate in public discourse of bar associations is of fundamental importance for a democratic and pluralistic society.

PEN Norway had an exclusive interview with one of the directors of the bar, Lawyer Ezgi Şahin Yalvarıcı. Ezgi explains the background, developments and the potential impacts of these judicial processes that the bar directors are dealing with.

Can you explain the accusations against Istanbul Bar Association and the overall process?

The 2024 the General Assembly of the Istanbul Bar Association not only occurred during a period when professional problems seriously increased but also at a time when fundamental rights and freedoms were almost suspended, decisions of the Constitutional Court and the European Court of Human Rights were not applied, and the supremacy of law became debatable.

In these critical times, we, under the presidency of Av. Prof. İbrahim Ö. Kaboğlu, were elected to the task with a strong

> "Defending human rights can be considered a choice or a right for individuals. However, for lawyers and Bars, this is a legal duty, independent of the ethical requirements arising from the nature of the profession."

message about the necessity of defending social justice, among 11 different election groups/candidates. From the moment we took office, while we took steps to resolve our colleagues' professional problems, we also acted with the awareness of our duty to defend the supremacy of law, fundamental rights and freedoms, and human rights, which is the primary duty of Bar Associations. In Turkey, particularly recently, pressures on all segments of society, including journalists, politicians, and artists, have been increasing. During this period, arbitrary investigations and detentions were carried out, and elected mayors were removed from office through trusteeship appointments known as 'kayyum'.

Statement on Journalist Deaths

On October 19, 2024, the national press reported the deaths of two journalists, both Turkish citizens, in Syria. An independent organisation concerning journalistic ethics and principles, the Press Council, called for a comprehensive and effective investigation into the deaths of the two journalists. The same call was made by the Journalists' Association of Turkey and Confederation of Progressive Trade Unions of Turkey (DİSK) - Press Worker's Union

On October 21, during a protest and press statement regarding the deaths of the two journalists, police physically intervened and several participants, including some of our member lawyers, were detained. On the same day, we had published a statement on our social media accounts against these illegalities.

In our statement, we call people's attention to international human rights law regarding the protection of journalists in conflict areas and demanded an effective investigation concerning the deaths reported in the national media on 19.12.2024, and the release of our member lawyers and citizens who were detained for making a press statement regarding these deaths.

The next day, the Istanbul Chief Public Prosecutor's Office announced that an investigation had been initiated against the Istanbul Bar Association in relation to their statement, for committing crimes of terrorist propaganda, praising crime and criminals, and spreading false information.

We learned through the news channels that an investigation had been initiated against us. This investigation process, and its announcement through the press, indeed shows that the investigation aims to suppress all potential channels of social criticism, including Bar Associations and lawyers.

Lawyers, who independently represent the element of defence in the judiciary, of course, have special protection rights for their freedom of expression and legal security. Article 58 of the Attorney Law states that investigations regarding crimes committed by lawyers during their duty can be conducted with the permission of the Ministry of Justice. However, contrary to this legal regulation, the Istanbul Chief Public Prosecutor's Office started the investigation directly without obtaining permission for the investigation and made a press statement contrary to the principle of confidentiality of the investigation – without informing the suspects. Moreover, the prosecution received the investigation permission from the Ministry of Justice only three days later.

Case against Istanbul Bar 'Illegal'

According to the mentioned legal regulation, it is not possible for the relevant Chief Public Prosecutor's Office to conduct a "*suo moto*" investigation before obtaining an investigation permission, yet the investigation proceedings were initiated and even a press statement was made contrary to the principles of confidentiality of the investigation while there was legally no investigation yet, clearly revealing the unlawfulness of the investigation against us. Although the prosecution stated that the investigation was started "*suo moto*", the required permission was only obtained from the Ministry of Justice three days later.

On January 7, 2025, we were present at the prosecution to make a statement. I must state that we had to assert that we did not accept the status of "suspect". The President of the Istanbul Bar

Association and the board members refused to be identified as “suspects” and under these conditions, refused to give a statement, only accepting to make a statement to the Public Prosecutor’s Office as “Declarants”.

While the criminal investigation was ongoing, on January 14, a lawsuit was filed in the Civil Court by the Istanbul Chief Public Prosecutor’s Office, only citing the initiated investigation as a reason, claiming that the Istanbul Bar Association was engaged in “activities outside its purpose” and demanding the termination of the terms of the Bar President and board members. After learning of this lawsuit, an extraordinary general assembly decision was made by all lawyers and election groups forming the Istanbul Bar Association General Assembly against the illegalities directed at the bar.

Board Member Detained by Police

In this process, our board member Lawyer Fırat EPÖZDEMİR was detained on January 25, 2025. Moreover, a file that had previously been dismissed was reopened, and events from 10 years ago that did not constitute a crime were accepted as a reason for detention. The investigation and detention against Fırat clearly form part of the effort to criminalize the Bar. The revival of a file that was dismissed after Mr. Epözdemir became a board member of the bar, and his detention upon his return from abroad following the investigation initiated against the bar, clearly show the unlawfulness of the detention process.

The Extraordinary General Assembly on February 23, 2025, was carried out with great solidarity and strength amidst a deep crisis of lawlessness and injustice. Despite the bad weather conditions, Bar Associations from all provinces in the country, the President and board members of the Union of Turkish Bar Associations, many lawyers from different countries, legal institutions, bar representatives, civil society organisations and everyone who believes in the rule of law came together to support our extraordinary general assembly and to defend the defence. This unity clearly caused discomfort as the investigation process against us was completed and an indictment was prepared after the extraordinary general assembly. The first hearing of the lawsuit demanding our dismissal will be held on March 4, 2025.

How do you respond to allegations that your statements as the Bar exceeded legal limits?

When responding to such claims, it is necessary to consider the principle of freedom of expression and its legal limits. Freedom of expression is a right guaranteed by Articles 26 and 28 of the Turkish Constitution, and this right is of fundamental importance not only for individuals but also for institutions responsible for protecting the social order.

The statement made by the Bar, in this context, was made as an integral part of the Bar’s obligation to protect human rights, by emphasizing fundamental rights such as the right to life,

> “The statement made by the Bar was made as an integral part of the Bar's obligation to protect human rights, by emphasizing fundamental rights such as the right to life, freedom of expression, press freedom, and the freedom of assembly and association. Moreover, the duty of the Bars is not limited to defending only the rights of their members. Bars are also obligated to defend the fundamental rights of all citizens in the countries where they are established.”

freedom of expression, press freedom, and the freedom of assembly and association. Moreover, the duty of the Bars is not limited to defending only the rights of their members. Bars are also obligated to defend the fundamental rights of all citizens in the countries where they are established.

Defending human rights can be considered a choice or a right for individuals. However, for lawyers and Bars, this is a legal duty, independent of the ethical requirements arising from the nature of the profession. The fulfillment of this duty by the Bars is a behavior that is consistent with the guarantees of the Constitution and in accordance with the basic principles of law. Therefore, these statements are completely appropriate both legally and ethically, and are indeed necessary.

> "İstanbul Bar Association, with nearly 67,000 members, is one of the strongest democratic voices in Turkey. With a democratic, liberal, and participatory understanding, the increasing pressures and threats of punishment since we took office with the ideal of defending human rights have turned into an intimidation targeting not only Istanbul Bar Association but the entire society."

Does the Istanbul Bar Association have a special obligation to protect freedom of expression? How can this obligation be positioned among the professional duties of the bars?

Bars and lawyers derive their rights and powers from both national and international law. Article 76 of the Attorney Law not only obliges bars to develop the legal profession but also gives them the duty to defend the basic values of their members such as honesty, trust, and professional respect. This article also emphasizes the social responsibilities of bars, such as defending the supremacy of law and protecting human rights. Additionally, Article 95/21 of the Attorney Law specifies that bars, and especially their boards, have a special obligation to defend the supremacy of law and protect human rights. This obligation reinforces the critical role of bars in defending the fundamental rights of society.

From the perspective of international law, the obligations of the Istanbul Bar Association are further reinforced. The International Association of Lawyers (UIA) Turin Principles state that lawyers have the right to practice their profession with full professional immunity, without any intervention or restriction. The United Nations Basic Principles on the Role of Lawyers also state that governments must ensure that lawyers do not face any pressure, interference, or harassment that would hinder their professional activities. Additionally, Recommendation No. 21 of the Council of Europe Ministers Committee emphasizes that the freedom to practice the legal profession must be protected and promoted based on the European Convention on Human Rights. In this context, criminalizing the exercise of freedom of expression by a legal institution like the Istanbul Bar Association, which represents the fundamental element of the judiciary, defence, and serves the public interest, and initiating an investigation against it is an interference with the essence of the right and constitutes a violation of both national and international law.

The Constitutional Court has acknowledged that "the concern of even slight sanctions faced by individuals participating in public discussions will have a deterrent effect on them" and that "under such an effect, there is a risk that individuals will hesitate to express and disseminate their thoughts in the future." Therefore, the investigation process initiated after our statement by the Bar clearly violates the positive obligation

to respect, protect, and promote the freedom to practice the legal profession, without any interference from the public.

The obligation of the Istanbul Bar Association to defend human rights – and particularly the right to life in the case under investigation involving two journalists whose right to life was violated – is both a legal and ethical necessity.

Do you think this case creates a self-censorship pressure on other bars and civil society in Turkey?

In recent years in Turkey, unacceptable practices such as unlawful investigations, hate speech, and targeting have been used as a tool to oppress the law against freedom of expression. Bars are not only professional organisations for lawyers but also play a critical role in achieving social justice, protecting fundamental rights, and defending the supremacy of law, serving the public interest. Investigating allegations of human rights violations, informing the public, and calling for the state to fulfill its international obligations are among the constitutional duties of bars and lawyers.

İstanbul Bar Association, with nearly 67,000 members, is one of the strongest democratic voices in Turkey. With a democratic, liberal, and participatory understanding, the increasing pressures and threats of punishment since we took office with the ideal of defending human rights have turned into an intimidation targeting not only Istanbul Bar Association but the entire society. The investigation initiated against us and the lawsuit aiming to dismiss us is an attempt to neutralize the advocacy of human rights by bars and weaken their independence. The increasing pressures on freedom of expression create a risk of having a deterrent effect at the societal level. The impression that even the managements of bars and civil society organisations face the threat of punishment may lead to widespread self-censorship regarding freedom of expression and press freedom. In Turkey, investigations have been previously initiated against bar board members and civil society organisations for their statements. However, we are facing a situation where both criminal prosecutions and demands for dismissal are encountered in such an unlawful manner for the first time.

This situation is a dangerous development threatening the independence of bars and civil society. Moreover, I would like to mention that these pressures have created significant solidarity both nationally and internationally, and this solidarity has strengthened our struggle. The effort to suppress lawyers actually only strengthens our belief and this solidarity and will ultimately fail.

What impact could this case have on the legal struggle in Turkey and the future of the legal profession?

This case should be considered in a much broader framework concerning the supremacy of law, judicial independence, and the right to defence in Turkey, not only concerning the Istanbul Bar Association. Bars are not only professional organisations for lawyers but also advocates for human rights, the right to a fair trial, and freedom of expression. If a bar is investigated for its statements or stance regarding the supremacy of law, this indicates that not only a professional organisation but the entire society's right to access justice is under threat.

If lawyers and bars feel pressured while performing their duties, the most vulnerable groups—individuals who suffer human rights violations, journalists, civil society actors—who most need legal support become defenceless. The struggle for rights also falters in an environment where lawyers cannot work freely. The intention created by these cases is to weaken the independence of the legal profession.

However, history has shown that lawyers have always continued their advocacy for rights despite pressures. Today, lawyers and bars fighting for justice are defending not only their professional organisations but the rights of the entire society. Therefore, this case is not only a legal process but also a turning point for the future of justice and freedoms. Even initiating an investigation in a state that recognises the rule of law should be absurd; this series of legal absurdities must be ended immediately.

What can you say about the impact of silencing lawyers on citizens' access to justice? Where do you think the "right to defence" begins and ends?

The silencing of lawyers is not just an attack on individual professionals in a society; it is a systematic interference with everyone's right to access justice. The defence is one of the three fundamental pillars of the judiciary, and when lawyers cannot perform their duties freely, the right to a fair trial ceases to be just a principle and is effectively violated.

Authoritarian regimes often target lawyers first because independent lawyers form the strongest defence line against arbitrary detentions, unfair trials, and human rights violations. The right to defence is not just an individual's right to be represented in court; this right includes the ability of lawyers to perform their profession freely, defend their clients free from any pressure, and fulfill their responsibilities to defend the supremacy of law.

The right to defence does not start when an individual faces charges; it begins when an unlawful practice first appears, or even when a voice is raised to prevent such practices. Lawyers fulfill their defence duties not only in courtrooms but also when they raise awareness about the supremacy of law in society and oppose the arbitrary application of laws.

However, in authoritarian regimes, the right to defence is presented as a privilege, restricted, or completely eliminated. The cases opened against lawyers today are not just individual trials; they are part of a larger attack on the independence of the judiciary, the public's access to justice, and fundamental rights and freedoms. The prosecution of lawyers for practicing their profession, raising their voice against injustices, or defending human rights is not only individual rights violations but also systematic threats to judicial independence and the right to access justice.

Is there a message you would like to convey to international human rights organisations, or anything else you would like to add?

The supremacy of law is not just a principle written in constitutions; it is the most fundamental guarantee mechanism protecting human rights. If lawyers in a country are prosecuted for practicing their profession, raising their voice against injustices, or defending the right to defence, this is not just an individual pressure issue but a systematic threat to the entire society's right to access justice. Today, I might be prosecuted as a lawyer.

But actually, what is being judged is the right to defence itself. In a country where lawyers are suppressed, no one is safe—neither journalists, academics, nor citizens. Because when lawyers are silenced, the voice of those who suffer injustice is also silenced.

When the independent defence disappears in the asymmetric relationship between the authority and the individual, what remains is fascism. The solidarity and strong stance of international human rights organisations, such as PEN Norway, against such pressures is of critical importance not only for individual cases but for protecting the supremacy of law on a global scale. Silence encourages authoritarianism. Therefore, the support and solidarity we receive, especially during this process, are very meaningful for all of us. This solidarity not only empowers us but also everyone seeking justice and defending the supremacy of law.

PEN NORWAY

Legal Report on Indictment: **18 Lawyers Registered with the Istanbul Bar Association**

Gerrit Jan Pulles &

Veya Ayra Mandapat

In 2015, curfews were declared in cities with a predominantly Kurdish population, including the Cizre district of Şırnak, during which severe human rights violations were observed. In response, 18 lawyers from the Istanbul Bar Association who protested the situation were prosecuted for "making propaganda for a terrorist organisation," but were acquitted at the end of the trial.

Legal Report on Indictment: 18 Lawyers Registered with the Istanbul Bar Association

Authors: Gerrit Jan Pulles & Veya Ayra Mandapat

1. Introduction

This report is a part of PEN Norway's Turkey Indictment Project, and its purpose is to examine the indictment against 18 lawyers issued by the Chief Public Prosecutor's Office of Istanbul, on 15 December 2017 (with Investigation no. 2015/121624; Merits no. 2017/37442; Indictment no. 2017/6940). The evaluation will be conducted in accordance with Turkey's domestic law and international human rights law to determine whether the indictment adheres to these standards. The report is divided into three sections. Section 2 provides a brief summary of the background information on the case. Section 3 presents the legal analysis of the indictment. It assesses the indictment in light of international standards, in particular 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. Finally, section 4 offers a few selected recommendations.

2. Summary of Case and Background Information

In 2015, curfews were declared in the Kurdish-majority provinces of Southeastern Turkey, including Şırnak's Cizre district. During this time, people living in the region were cut off from the outside world, without any electricity, water, and healthcare services. There were dozens of lives lost due to these sanctions. Because of these events, on 15 September 2015 around 200 lawyers affiliated with the Istanbul Bar Association attempted to organize a protest march in Taksim Square / Istiklal Avenue, considered the heart of Istanbul. When this was not permitted, the lawyers staged a sit-in protest against state actions in Cizre. They received warnings from law enforcement agencies; however, they proceeded to unfurl a banner and chant slogans condemning state actions. The protest also included speeches accusing the state of war crimes and human rights violations. After concluding their statements, they dispersed. There were no incidents that occurred; the protest was entirely peaceful.

More than two years later, 18 out of approximately 200 lawyers present received an indictment, charging them with "disseminating propaganda in favor of a terrorist organisation", as defined by Article 7/2 of the Anti-terrorism Law No. 3713. The case was then heard before two different High Criminal Courts in Istanbul. Although the lawyers were acquitted in the trial, the proceedings lasted for years.

The indictment does not specify the conduct of the 18 lawyers. In particular, the indictment does not mention anything about the specific conduct of which the indicted lawyers are accused, nor does the indictment provide any arguments as to why this conduct should be imputed to the individual lawyers indicted.

3. Analysis of the Indictment

3.1 The Right to a Fair Trial (Article 6 ECHR)

3.1.1 Introduction

Article 6, section 1, of the European Convention on Human Rights (ECHR) reads:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

The right to a fair trial is enshrined in this article, which is essential in establishing the rule of law. The article comprises several fundamental guarantees to ensure that every person charged with a criminal offense is given a fair hearing, within a reasonable time, and by an independent and impartial tribunal established by law.

3.1.2 The Length of Proceedings

Essential to the case at hand, the ECHR requires cases to be heard within a "reasonable time". Accordingly, the relevant period begins from the moment the action was instituted before the competent court,[1] and the period ends when the whole of the proceedings is over.[2]

Whilst there is no exact number of years set by the ECtHR, previous case law has established that exceeding "reasonable time" is only excused if the case is complex.[3] This complexity includes, for instance, if there are multiple charges involved or if the case is large-scale and requires investigations in several countries.[4] In *Neumeister v. Austria,* the ECtHR ruled that a case of nine years and seven months exceeded the "reasonable time" requirement, as it had no other complexity than the number of people involved (35).[5] However, a case of over five years regarding international money laundering, which required global investigations and financial expertise was regarded as complex, and therefore did not exceed the "reasonable time" requirement.[6] Thus, the complexity of the case is a determining element for whether "reasonable time" was exceeded or not. Moreover, this shows that the ECtHR underlines the importance of administering justice without delays which might jeopardize its effectiveness and credibility.[7]

In this case, it is essential to first highlight the timeline of the indictment. The alleged offense took place on the 15th of September 2015, and the indictment was only issued on the 15th of December 2017. Therefore, the indictment took two years and two months to be delivered. Along with concerns about a fair trial, such late indictments likely undermine the credibility of the court and the principle of legal certainty, as they may lead to public uncertainty about potential prosecutions.

Moreover, although the lawyers were acquitted in trial, the proceedings lasted several years. The Istanbul 36th High Criminal Court announced its verdict on the 22nd of February 2022, while the Istanbul 13th High Criminal Court reached a verdict on the 30th of November 2023. Even though the lawyers were acquitted, the proceedings still lasted for around eight years. As established by *Neumeister v. Austria,* the mere number of lawyers in the indictment (18) does not make this a complex case. Furthermore, it is likely that the case in question did not require complex, large-scale investigations in multiple countries nor was specific expertise required.[8] Therefore, eight years for the entirety of the proceedings is disproportionately long and cannot be a "reasonable time" for the case to have taken place. Therefore, the length of the proceedings in this case is a violation of Article 6/1 ECHR.

3.1.3 The Clarity of the Indictment

Article 6, section 3(a) ECHR further states that those charged with a criminal offense must be informed promptly, in a language which they understand and in detail, of the nature and cause of the accusation against them. In the preceding paragraph it has already been argued that the present indictment has exceeded the reasonable time requirement. Therefore it is submitted here that the requirement of informing promptly has also not been met. This also applies to the other guarantees Article 6, section 3(a) ECHR, for the following reasons.

The extent of "detailed" information varies depending on each case; however, the accused must at least be provided with sufficient information to fully understand the extent of the charges against them, to prepare an adequate defence.[9] This information is "detailed" when the offenses the defendant is accused of are sufficiently listed; the place and date of the offense is stated; there is a reference to the relevant Articles of the Criminal Code; and the name of the victim is mentioned.[10] Moreover, the "cause" of the accusation refers to the acts they are alleged to have committed and on which the accusation is based, and the "nature" refers to the legal characterization given to those acts.[11]

> "The indictment took two years and two months to be delivered. Along with concerns about a fair trial, such late indictments likely undermine the credibility of the court and the principle of legal certainty, as they may lead to public uncertainty about potential prosecutions."

Whilst the indictment contains the elements for it to be "detailed", it is unclear which lawyers exactly communicated certain statements that subsequently led to their accusation. The indictment states that the lawyers delivered speeches on behalf of the group and that they submitted a written statement to the press and police; nevertheless, the indictment does not specify which lawyers delivered such speeches or statements. Thus, the document cannot be classified as having "detailed" information.

Furthermore, even though the lawyers in the indictment speak Turkish, the indictment is difficult to comprehend due to its poor grammar and organisation. Much of the indictment explains the PKK/KCK and a description of the speeches delivered by the lawyers during the protest. The indictment further contains biased and leading language; for instance, it states that the lawyers' written statement to the press was "misleading and divisive".[12]

Therefore, the indictment does not thoroughly and objectively evaluate the actions committed by the lawyers, and how those actions have caused them to breach Article 7/2 of the Counter-terrorism Law numbered 3713. Thus, the lack of clarity of the indictment constitutes a violation of Article 6/3-a ECHR.

Furthermore, it is established case law of the ECtHR that there can be no criminal conviction nor a penalty unless *personal* liability for an offence has been established in accordance with the law.[13] Underlying this case law are the principle of the presumption of innocence and the principle of legality, according to which no penalty may be imposed on a person without a finding of personal liability. Similarly, no one can be held guilty of a criminal offence committed by another. However, the

indictment fails to establish a criminal offence and fails to establish personal (criminal) liability of the lawyers indicted. The lack of clarity as to the specific conduct of which the indicted lawyers are accused and the complete lack of arguments as to why this conduct should be imputed to the individual lawyers indicted is a clear breach of the relevant articles of the ECHR and a violation of the underlying fundamental principles of procedural and substantive fairness: the principle of the presumption of innocence and the principle of legality.

Conclusions

It follows that the entirety of the proceedings in question is a violation of Article 6 ECHR. This is because:

- The length of the proceedings did not take place within a "reasonable time", .
- The indictment lacks clarity in terms of grammar, organisation, and thorough evaluation of the nature and crime in question.
- The conduct of the 18 lawyers is not specified, hence violating the fundamental principles of presumption of innocence and principle of legality.

3.1.4 Recommendations

In line with the above analysis, future indictments can be improved by ensuring that they are issued in a timely manner, and that the whole of the proceedings must take place within a "reasonable time". In future cases, Turkey'sprosecutors should take into account whether future cases may be complex in relation to ECtHR case law. If it is not, then they are likely violating the "reasonable time" requirement under Art. 6/1 ECHR.

Moreover, the indictment should be clear; it should outline the nature and cause of the accusation against whom the indictment is issued – rather than merely being descriptive of the events that occurred. The sentences should further be concise, rather than each sentence being around ten lines long, as seen in previous analyzed indictments.[14] By taking into account such recommendations of issuing the indictment and conducting the proceedings within reasonable time, and writing a clear indictment, Turkey's authorities are least likely to breach fundamental human rights.

3.2 The Freedom of Expression (Article 10 ECHR)

3.2.1 Introduction

Article 10, section 1, of the European Convention on Human Rights reads:

> "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises."

The article enshrines the right to freedom of expression, which allows individuals to hold opinions without interference by the State. This right has been recognized as one of the essential foundations of a democratic society and a prerequisite for personal fulfillment and societal progress[15] which underpins the protection of other rights.[16]

3.2.2 The Alleged Statements

To conduct a comprehensive assessment of the indicted lawyers' right to freedom of expression, it is necessary to analyze the statements for which they are being charged and the context in which they delivered them.

The indictment mentions the following facts underlying the indictment.

- Several of the approximately 200 lawyers present chanted slogans such as "You cannot be free alone, it is either all together or none of us, Resisting peoples are not alone, Biji berhadane Cizre [Kr. Long live the Cizre Resistance], Biji biratiye gelan [Kr. Long live the sisterhood of the people], Kurdish people will defy the extermination attempts, The murderer state will face the consequences, Everywhere is Cizre everywhere is resistance, AKP wants war and peoples want peace, ISIS is the Killer AKP is the accomplice, Long live revolutionary solidarity, Şehit namırın [Kr. Martyrs won't die] and AKP is the Killer ISIS is the accomplice", that despite being warned by the law enforcement officers that slogans constituting a criminal offense were being shouted which should stop.

- Several of the approximately 200 lawyers present delivered speeches which are summarized in the indictment as follows: "In Cizre, violence was inflicted on the people of Cizre by the State, the people's natural needs such as electricity and water were cut off, water pipes were blown up by the State, municipality workers who went to repair them were detained by the police, bearded ISIS militants wearing police uniforms were roaming the streets of Cizre, helicopters were used to machine gun the houses of innocent people, the curfew in Cizre was unlawfully imposed to hide the oppression and torture experienced by the people of Cizre".

- Several of the approximately 200 lawyers present participated in singing the hymn known as HERNEPEŞ, which, according to the indictment, "glorifies the PKK terrorist organisation", despite being told by officials to cease this singing immediately.

- Finally, the indictment mentions a press statement, which was delivered on behalf of the group by a lawyer named Züleyha GÜVEN, who is not among the lawyers indicted in the present case. Afterwards the statement was distributed to the press and the public. According to the indictment the statement contains "misleading and divisive remarks". The statement appears to be cited in full in the indictment. We will refer to the relevant parts of the text in the sections below.

Legality and presumption of innocence
As mentioned before, the indictment does not provide any information or argumentation as to why this speech should be imputed to the individual lawyers indicted. For that reason alone, this indictment violates fundamental principles of fairness. In addition, it will be argued below that the indictment violates the right to freedom of expression.

Factual statements
Several of the statements mentioned in the indictment are factual statements of a general nature, stating for example i) that a curfew was ordered; ii) that electricity and water were cut off; iii) that people were injured and died, and iv) that homes and workplaces were destroyed. The statements are statements of fact that are very general in nature and therefore not of a controversial nature, based on facts that are available to anyone, and their truth was and is easily verifiable. According to established case law of the ECtHR such statements of facts fall within the freedom of expression and under the protection of Article 10, section 1, of the ECHR.[17]

Political debate
Furthermore, the demonstration of the group of 200 lawyers should be viewed within the wider public political debate about the events that took place in 2015 in Cizre and other parts of Southeastern Turkey. Many Turkish citizens participated in these debates, among them lawyers, academics, human rights groups, journalists and opposition politicians.[18] The role of the government of Turkey in the events of 2015 has been criticized by many, among which were the 200 lawyers mentioned in the present indictment.

As to these forms of debate and criticism, the ECtHR has taken the view that in a democratic system the actions or omissions of the government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of public opinion. Consequently, the ECtHR has established that the limits of permissible criticism with regard to the Government are very wide.[19]

The threshold for restricting such criticism is very high and the margin of appreciation very narrow, as will be demonstrated below. The unsubstantiated assertion in the indictment that the indicted lawyers did "provoke the public", "create a social uprising" or were "disseminating propaganda in favour of a terrorist organisation" are entirely insufficient and cannot justify a restriction of the freedom of expression of the participants in the demonstrations.

3.2.3 Special Protection for Lawyers

The protection of the right to freedom of expression varies depending on the context in which it is exercised. In the case of lawyers, the ECtHR has recognized that they play a crucial role in the administration of justice, and thus, their right to freedom of expression is accorded special consideration and protection.[20] The ECtHR case law on Article 10 ECHR outlines that lawyers 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 and recognize the unique position of lawyers in the administration of justice. Lawyers are key actors in the justice system, directly involved in its functioning. [21]

> "The demonstration of the group of 200 lawyers should be viewed within the wider public political debate about the events that took place in 2015 in Cizre and other parts of Southeastern Turkey. Many Turkish citizens participated in these debates, among them lawyers, academics, human rights groups, journalists and opposition politicians."

In the seminal case of *Morice v. France*[22] the ECtHR elaborated on the high level of protection that is accorded to lawyers:

> "The specific status of lawyers gives them a central position in the administration of justice as intermediaries between the public and the courts (…) Lawyers are thus entitled, in particular, to comment in public on the administration of justice, provided that their criticism does not overstep certain bounds. (…).
>
> The question of freedom of expression is related to the independence of the legal profession, which is crucial for the effective functioning of the fair administration of justice. It is only in exceptional cases that restriction – even by way of a lenient criminal penalty – of defence counsel's freedom of expression can be accepted as necessary in a democratic society."[23]

In the *Morice* case, the ECtHR emphasized that restrictions of the right to freedom of expression were reserved for "gravely damaging attacks that are essentially unfounded", which had not been made in the case.[24]

Furthermore, when the matter in question concerns public interest, it is established case law of the ECtHR that:

> "[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 (...). A degree of hostility and the potential seriousness of certain remarks do not obviate the right to a high level of protection, given the existence of a matter of public interest.[25]

It follows from the above that the statements were fully covered by the freedom of expression as protected by Article 10, section 1, of the ECHR. Therefore, the present indictment and prosecution are a direct violation of this right by the Turkish State.

3.2.4 (Un)lawful Restrictions to Article 10

Article 10, section 2, ECHR sets out the circumstances under which States may restrict the right to freedom of expression. Three assessment criteria are used to determine whether such restriction does or does not violate the right to freedom of expression. A restriction must be "prescribed by law", it must pursue "a legitimate aim" within the meaning of Article 10, section 2, and, lastly, a restriction must be "necessary in a democratic society".

In the majority of cases, it is the latter question that determines the outcome of a given case.[26] In its case law, the ECtHR has developed the autonomous concept of whether the interference is "proportionate to the legitimate aim pursued". As a general principle, the "necessity" of any restriction must be convincingly established, and the restriction must be relevant, sufficient, and proportionate to its intended purpose.

In the 2017 *Beslan School Siege case*, the ECtHR held that States have the right to take preventative measures to prevent terrorism or the incitement of violence. However, States must discharge these obligations in a manner that respects human rights and the rule of law, including the freedom of expression.[27] Thus, the principles regarding freedom of expression also apply to measures taken to safeguard national security and public safety as part of counter-terrorism efforts. To impose limitations based on national security, the perceived risk must not be theoretical or vague. The risk must involve at least a "reasonable risk of serious disturbance" to the public order in a democratic society. Only then can a restriction on freedom of expression be deemed reasonable and lawful.

To determine this, the ECtHR "look[s] at the interference in the light of the case as a whole to determine whether the restriction is proportionate, including the content of the impugned statements and the context in which they were made".[28] For crimes of expression to be prosecuted it is essential to establish a direct connection between the words spoken and the actual and intended harm or risk posed. If there is no reasonable relationship between the individual's expression and the alleged harm or risk, then the link is too remote to establish individual responsibility.[29]

Also relevant to the present case is the case of *Ali Gürbüz v. Turkey.*[30] It also involved restriction of the freedom of expression and prosecution under Turkey's Anti-Terrorism Law no. 3713. In this case, Mr Gürbüz had criminal proceedings brought against him for publishing statements by the leaders of organisations characterized as terrorist under Turkish law. These messages did not call for any violence, armed resistance or uprising, and did not constitute any hate speech.

The ECtHR held that if a State initiates criminal proceedings against individuals for publishing statements, without considering the content of these statements or their contribution to public debate, they can be seen as attempting to use criminal law to (systematically) suppress such publications. The ECtHR finds this is incompatible with the freedom to receive or impart information and ideas.[31] Therefore, the court decided that the impugned measure did "not meet a pressing social need, that it was by no means proportionate to the legitimate aims sought to be achieved and that, therefore, it was not necessary in a democratic society."[32] Consequently, the ECtHR held that Turkey had violated Article 10 of the ECHR.

3.2.5 Conclusion

It follows from the above, and it is submitted here, that the restriction of the freedom of expression violates the right to freedom of expression and is not permitted by Article 10, section 2, ECHR.

- Several of the statements mentioned in the indictment are factual statements of a general nature, which are publicly available and can be easily verified. Such statements are protected by Article 10, section 1, and cannot be restricted under Article 10, section 2, ECHR.

- Other statements were part of a wider public political debate in which the government of Turkey has been criticized by many within Turkey. None of these statements can be qualified as 'gravely damaging attacks that are essentially unfounded'. The unsubstantiated accusations in the indictment that the peaceful demonstration "provoked the public", "created a social uprising" or "disseminated propaganda in favour of a terrorist organisation" cannot change this conclusion. Therefore, the lawyers were entitled to protection granted by Article 10, section 1, ECHR and the statements made during the demonstration cannot be restricted under Article 10, section 2, ECHR.

- The protection of Article 10 and the threshold for restricting the freedom of expression is even higher for the indicted persons in the present case, as they were lawyers addressing a matter of public interest.

> "Several of the statements mentioned in the indictment are factual statements of a general nature, which are publicly available and can be easily verified. Such statements are protected by Article 10, section 1, and cannot be restricted under Article 10, section 2, ECHR."

3.3 The Freedom of Assembly (Article 11 ECHR)

3.3.1 Introduction

Article 11, section 1, of the ECHR reads:

> "Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests."

This article provides for the freedom of assembly and association for the protection of their interests.[33] This freedom can only be restricted if it is necessary in a democratic society, in the interests of national security or public safety.[34]

3.3.2 Peaceful Assembly

Article 11 ECHR only protects the right to peaceful assembly; it does not cover a demonstration where the participants act violently or have violent intentions.[35] The guarantees of Article 11 thus apply to all demonstrations, except for those where participants incite violence or otherwise reject the foundations of a democratic society.[36] In order to establish whether the applicant may invoke the protection of this article, the Court considers (i) whether the assembly intended to be peaceful and whether the organizers had violent intentions; (ii) whether the applicant had demonstrated violent intentions when joining the assembly; and (iii) whether the applicant had inflicted bodily harm on anyone.[37]

In *Oya Ataman v. Turkey*, Ataman peacefully protested against prison conditions in Turkey. Even though there was no threat to public order, Turkish authorities subjected Ataman and several of her colleagues to arbitrary arrest and repelled them with pepper spray. The ECtHR found this to be a violation of Article 11 ECHR.

Similarly, the lawyers in this case were peacefully protesting. They left of their own accord without any violence necessary, hence demonstrating they did not have violent intentions.

Nevertheless, the indictment orders the lawyers' imprisonment and deprivation of certain rights. Analogously to *Oya Ataman v. Turkey,* this would amount to a violation of the right to peaceful assembly under Article 11 ECHR.

3.3.3 Sanctions

Article 11 further establishes that if the sanctions imposed on the demonstrators are criminal in nature, they require particular justification.[38] A peaceful demonstration should not, in principle, be rendered subject to the threat of a criminal sanction[39], and notably to deprivation of liberty.[40] Thus, the court must carefully analyze with scrutiny the cases where sanctions imposed by the national authorities for non-violent conduct involve a prison sentence.[41]

In this case, the indictment orders that in case of the lawyers' conviction to imprisonment, they should be deprived of certain rights. However, as their demonstration was peaceful, such punishment requires proper justification in the indictment, in which the prosecution has the burden of proof.

> The lawyers in this case were peacefully protesting. They left of their own accord without any violence necessary, hence demonstrating they did not have violent intentions. Nevertheless, the indictment orders the lawyers' imprisonment and deprivation of certain rights.

Moreover, in *Kemal Çetin v. Turkey*, the ECtHR established that a penalty for shouting slogans and holding banners during a demonstration due to their content is considered an interference with the right to freedom of peaceful assembly under Article 11.[42] In this case, the demonstration included slogans and signs praising the PKK; however, the ECtHR ruled that using slogans and signs considered illegal by Turkey cannot justify the suppression of the applicant's right to demonstrate.[43]

The indictment at hand describes in detail the slogans stated and banners held by the lawyers during the demonstration. For instance, the slogan "We will stop the war, massacres and dictatorship" was said; and banners with the words "We will stop the War, Massacres, Dictatorship, Long Live the Sisterhood of Peoples" were unfurled. The legal evaluation and conclusion of the indictment clearly state that the banners and slogans amount to the crime of disseminating propaganda in favor of a terrorist organisation, and therefore contribute to the lawyers' potential conviction. However, as shown in *Kemal Çetin v. Turkey,* the fact that such words are considered illegal by the Turkish authorities does not justify suppressing the right to assembly. Accordingly, such a penalty is incompatible with Article 11 ECHR.

3.3.4 (Un)lawful Restrictions to Article 11

Article 11, section 2, ECHR sets out the circumstances under which States may restrict the right to freedom of assembly and association. Three assessment criteria are used to determine whether such restriction does not violate the right. A restriction must be "prescribed by law", it must pursue "a legitimate aim" within the meaning of Article 11, section 2, and, lastly, a restriction must be "necessary in a democratic society". As is the case with the right to freedom of expression as outlined in the previous paragraph, in the majority of cases it is the latter question that determines the outcome of a given case.[44]

The ECtHR usually accepts that the measures in question pursued a legitimate aim if they are for "prevention of disorder" or "the protection of the rights of others" or both.[45] However, if the aim is irrelevant, the ECtHR will likely reject it. In *Navalnyy v. Russia*, the Court did not accept the aim of prevention of disorder in events where the gatherings caused no nuisance.[46] Similarly, as the protest in this case was entirely peaceful, it is likely that the Turkish courts cannot evoke the justification of "legitimate aim" for attempting to stop the demonstration and indicting the lawyers.

To determine whether the measures in question were necessary in a democratic society, the ECtHR established that the Contracting States enjoy a certain but not unlimited margin of appreciation.[47] In *Akgöl and Göl v. Turkey*, the ECtHR stated that a peaceful demonstration should not, in principle, be rendered subject to the threat of a criminal sanction.[48] The Court thus ruled that the interference with the applicants' rights under Article 11 was disproportionate and unnecessary for preventing disorder within the meaning of section 2. Since the lawyers in this case faced the threat of a criminal penalty, it is likely that the Turkish courts cannot justify their actions as a necessity in a democratic society. As a consequence, the present indictment and criminal proceedings constitute a non-justified restriction to the right to freedom of peaceful assembly and to freedom of association with others.

3.3.5 Conclusion

It follows from the above that the indictment issued is a violation of Article 11 ECHR. This is because:

- The lawyers in the demonstration were entirely peaceful and did not engage or incite any act of violence; hence, they were entitled to the full protection of Article 11 ECHR .
- The indictment involves the threat of criminal sanctions, which is incompatible with Article 11 ECHR, as the protest was entirely peaceful, and such sanctions cannot be imposed due to banners raised or slogans stated during the demonstration.
- The interference cannot be said to have a legitimate aim", nor were they "necessary in a democratic society" within the meaning of Article 11, section 2, ECHR.

3.4 Limitation on Use of Restrictions on Rights (Article 18 ECHR)

Article 18 ECHR reads as follows: "The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed". This article limits the use of restriction on rights and empowers the Court to investigate whether criminal prosecutions have been perverted into instruments of suppression going beyond the surface of measures that could apparently seem legitimate.[49] Article 18 has an auxiliary function, meaning that it is a non-autonomous provision, that can only be invoked in conjunction with another Convention right, which has to be a qualified right subject to restrictions. However, a violation of Article 18 can still be found regardless of whether the right that was invoked in connection with it was not violated.

As it emerged from two recent cases from the ECtHR, *Demirtaş v. Turkey* (no. 2) [GC] and *Kavala v. Turkey*, the Court observed an ongoing pattern of oppression of political dissent, human rights defenders, journalists and lawyers in Turkey. In both cases the Court found a violation of Article 18 ECHR.

In Demirtaş, the Court stated that:

> "[I]t has been established beyond reasonable doubt that the applicant's detention, especially during two crucial campaigns relating to the referendum and the presidential election, pursued the ulterior purpose of stifling pluralism and limiting freedom of political debate, which is at the very core of the concept of a democratic society."[50]

This judgment highlights the ulterior purpose behind Demirtaş's deprivation of liberty and the Court ordered his immediate release providing "an unequivocal solution to the protracted political crisis in Turkey concerning the fate of Selahattin Demirtaş and other opposition politicians and dissidents in general".[51] The significance of the Grand Chamber judgment cannot be understated; it sends a powerful and clear message to the government that has the duty to recognise and protect the freedoms that political dissidents enjoy in a democratic society governed by the rule of law.

Similarly, in *Kavala*, the Court concluded that the "restriction of the applicant's liberty was applied for purposes other than bringing him before a competent legal authority" and that:

> "[T]he prosecution's attitude could be considered such as to confirm the applicant's assertion that the measures taken against him pursued an ulterior purpose, namely to reduce him to silence as an NGO activist and human-rights defender, to dissuade other persons from engaging is such activities and to paralyse civil society in the country."[52]

As it has been observed by many, the targeted harassment of human rights defenders in Turkey is part of a wider practice of arbitrary detentions and abusive prosecutions of journalists, elected politicians, lawyers, and other perceived government critics. This practice has been well-documented in many reports by the Council of Europe, the European Union, and human rights organisations.[53]

Considering the broader context in which the present indictment was issued, we can see a pattern of oppression of dissent in Turkey that provokes a chilling effect on various rights protected by the Convention, including the right to freedom of expression and the freedom of assembly, and causes the deterioration of the rule of law. Therefore, it is argued that the present indictment was issued with the purpose of silencing the indicted lawyers, in their capacity of prominent figures tasked with upholding the rule of law by advocating for human rights in Turkey through the exercise of the right to freedom of speech

3.5 UN Basic Principles on Role of Lawyers

In analysing the indictment, attention must be paid to the UN Basic Principles on the Role of Lawyers.

The United Nations Basic Principles on the Role of Lawyers (the "UN Basic Principles")[54] are an instrument developed within the framework of the United Nations in 1990. It is the only international instrument which sets out principles that underlie and safeguard the practice of the legal profession.[55]

The UN Basic Principles do not create legal obligations in the same vein as a treaty would. However, some of these principles are binding on States by virtue of the interpretation (by regional tribunals) of human rights treaties, as well as through binding domestic case law.

The UN Basic Principles refer to a broad range of issues, such as entry into the profession and access to counsel. However, some of its most important and often cited principles (16-18, 23 and 24) refer to the independence of the legal profession, understood as the ability of lawyers to practice their profession without intimidation, hindrance, harassment, or improper interference. Of these core principles, the following are especially relevant in the present case.

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."

As argued extensively in this report, the authorities have grossly violated the freedom of expression and the freedom of assembly of the indicted lawyers. In doing so, Principle 23 of the UN Basic Principles was violated.

3.6 UN Guidelines on the Role of Prosecutors

Principles 10 to 20 in the UN Guidelines on the Role of Prosecutors (UN Guidelines)[56] outline the role of the prosecutors in criminal procedures.

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".

Due to the inexcusable length of the proceedings, the flawed arrest and indictment; and because of the flagrant breach of the rights to freedom of expression and assembly, the decision to prosecute the indicted lawyers, the indictment itself, and the ensuing proceedings were not in line with this Principle 12, which accordingly has been breached by the prosecution in the present case.

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".

It seems apparent that the reason for the indictment and criminal prosecution of the lawyers in this case was of a political nature. This indicates that the indictment is lacking impartiality and could be politically motivated and the result of political discrimination.

Principle 14 of the UN Guidelines states:

> "Prosecutors shall not initiate or continue prosecution, or shall make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded."

Principle 23 of the UN Guidelines states:

> "Prosecutors shall respect the present Guidelines. They shall also, to the best of their capability, prevent and actively oppose any violations thereof."

> "Considering the broader context in which the present indictment was issued, we can see a pattern of oppression of dissent in Turkey that provokes a chilling effect on various rights protected by the Convention, including the right to freedom of expression and the freedom of assembly, and causes the deterioration of the rule of law."

Given these two Principles, and given the circumstance that the present indictment and prosecution constitutes various breaches of these Guidelines by the prosecution, the continuation of the proceedings against the indicted lawyers would amount to a protracted breach of these Guidelines by the prosecution and should therefore not be allowed.

4. Conclusion and Recommendations:

In light of the foregoing, we conclude that the criminal charges brought against the 18 lawyers that were indicted in the present proceedings fail to comply with Turkey's obligations under international and European human rights law, in particular the right to a fair trial, the right to freedom of peaceful assembly and to freedom of association with others and the right to freedom of expression. As such, the charges constitute an unlawful restriction on the right to freedom of expression under the Articles 6, 10 and 11 of the ECHR. It follows that, should the lawyers be convicted, their conviction would equally constitute an unnecessary interference with the right to freedom of expression. Also, this indictment and the procedure violate Article 18 of the ECHR as it deliberately restricts the rights and freedoms the present lawyers have under the ECHR. Finally, this indictment contravenes the UN Basic Principles on the Role of Lawyers as well as the UN Guidelines on the Role of Prosecutors.

In the light of all these considerations, the most fundamental recommendation that can be given to the judicial authorities of Turkey would be to adopt the application of international law to which Turkey is a party as a priority principle, regardless of the characteristic of the case before them.

Endnotes

1 Poiss v. Austria, / 50; Bock v. Germany, / 35
2 König v. Germany, / 98
3 Neumeister v. Austria, 1968, / 20
4 Ibid.; Arewa v. Lithuania, 2021, / 52
5 Milasi v. Italy, 1987, // 14-20
6 C.P. and Others v. France, 2000, / 30
7 H. v. France, / 58; Katte Klitsche de la Grange v. Italy, / 61 ECtHR
8 See C.P. and Others v. France, 2000, / 30, H. v. France, / 58; Katte Klitsche de la Grange v. Italy, / 61 ECtHR
9 Mattoccia v. Italy, 2000, / 60
10 Brozicek v. Italy,1989, / 42
11 Mattoccia v. Italy, / 59; Penev v. Bulgaria, / / 33 and 42
12 Indictment, page 5
13 This follows from Article 5, section 1 a, Article 6, sectin 2, and Article 7, section 1, ECHR. See e.g. Vervara v. Italy, 29 October 2013, no. 17475/09, par 69; Engel and Others v. Netherlands, 8 June 1976, / 68, Series A no. 22; Guzzardi v. Italy, 6 November 1980, / 100, Series A no. 39.
14 PEN Norway Guideline for Prosecutors, p. 26
15 Dichand and Others v Austria, no 29271/95, Judgment of 26 February 2002, par. 37; Handyside v. United Kingdom, 7 Eur. Court H.R. 413 (1976).
16 "Guide on Article 10 of the European Convention on Human Rights Freedom of Expression" (Council of Europe, ECtHR 2022) (hereinafter "Guide on Article 10").
17 See e.g. Oberschlick v Austria (GC) 23 mau 1991, no. 11662/85. See also Guide on Article 10, par 202 ff.
18 See e.g. the reports of "Academicians for Peace" (https://barisicinakademisyenler.net/node/1); The Cizre Report of the HDP (HDPCizreReport.pdf); the report of Lawyers for Lawyers (https://lawyersforlawyers.org/wp-content/uploads/Cizre-The-Curfow-Report.pdf) and the further sources mentioned therein.
19 See the case law in: Guide on Article 10, par. 249 ff.
20 Sarah Maguire, Ishaani Shrivastava, "Freedom of Expression and Its Relationship with the Right to Respect for Private Life and the Right to a Fair Trial," March 2017, https://rolplatform.org/wp-content/uploads/2018/03/free_expression_guide-eng.pdf.
21 Guide on Article 10, par. 468 ff.
22 Morice v. France, no. 29369/10, Judgment of 23 April 2015 [GC].
23 Ibid. par 132-135.
24 Ibid. par 168.
25 Guide on Article 10, par. 488-492.
26 Guide on Article 10, par. 488-492.
27 Tagayeva and Others v. Russia, no. 26562/07, Judgment of 13 April 2017.
28 Ibid.
29 Ibid
30 Ali Gürbüz v. Turkey, no. 52497/08, Judgment of 12 March 2019.
31 Ibid. par. 77.
32 Ibid. par 78
33 Article 11(1) ECHR
34 Article 11(2) ECHR
35 Guide to Article 11, page 10
36 Kudrevicius and Others v. Lithuania [GC], 2015, / 92
37 Gülcü v. Turkey, 2016, / 97; and Shmorgunov and Others v. Ukraine, 2021, / 491
38 Rai and Evans v. the United Kingdom (dec.), 2009
39 Akgöl and Göl v. Turkey, 2011, / 43
40 Gün and Others v. Turkey, 2013, / 83
41 Taranenko v. Russia, 2014, / 87
42 Kemal Çetin v. Turkey, 2020, / 26
43 Kemal Çetin v. Turkey, 2020, / 35-39
44 Guide on Article 11, par. 48 f.
45 Guide on Article 11, par. 62
46 Navalnyy v. Russia [GC], 2018, // 124-126
47 Barraco v. France, 2009, / 42
48 Akgöl and Göl v. Turkey, 2011, / 43
49 Helmut Satzger, Frank Zimmermann, Martin Eibach, "Does Art 18 ECHR grant protection against politically motivated criminal proceedings? Rethinking the interpretation of Art 18 ECHR against the background of new jurisprudence of the European Court of Human Rights", EuCLR 4, no. 3 (2014), 106-112.
50 Selahattin Demirtaş v. Turkey (No. 2)[2020] application no. 14305/17 (ECtHR), para 437.
51 A Judgment to Be Reckoned with: Demirtaş v. Turkey (no. 2) [GC] and the ECtHR's Stand Against Autocratic Legalism" (Strasbourg Observers, 2021), accessed June 10, 2024, https://strasbourgobservers.com/2021/02/05/a-judgment-to-be-reckoned-with-demirtas-v-turkey-no-2-gc-and-the-ecthrs-stand-against-autocratic-legalism/; also: Başak Çalı, "The Whole Is More than the Sum of its Parts The Demirtaş v Turkey (No 2) Grand Chamber Judgment of the ECtHR" (Verfassungsblog, 2020), accessed June 10,

2024, https://verfassungsblog.de/the-whole-is-more-than-the-sum-of-its-parts/.

52 "Turkey: Release Osman Kavala" (International Commission of Jurists, 2020), accessed June 7, 2024, https://www.icj.org/turkey-release-osman-kavala/; Kavala v. Turkey [2020] application no. 28749/18 (ECtHR), paras 224-230.

53 Id.

54 https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-role-lawyers.

55 At a regional level in Europe, recommendations issued by the Committee of Ministers of the Council of Europe "on the freedom of exercise of the profession of lawyer" specifically address the legal profession"(https://www.coe.int/en/web/cdcj/cj-av).

56 https://www.ohchr.org/en/instruments-mechanisms/instruments/guidelines-role-prosecutors.

PEN NORWAY

Legal Report on Indictment: **Aryen Turan**

Gerrit Jan Pulles & Laura Vroom

Lawyer Aryen Turan was charged with making propaganda for a terrorist organisation after stating during the General Assembly of the Izmir Bar Association, of which she is a member, that an independent investigation was needed into allegations that Turkey used chemical weapons in cross-border military operations. She was acquitted at the end of the trial.

Legal Report on Indictment: Aryen Turan

Authors: Gerrit Jan Pulles & Laura Vroom

1. Introduction

This report is a part of PEN Norway's Turkey Indictment Project. Its purpose is to examine the indictment against Lawyer Aryen Turan which was issued by the Izmir Chief Public Prosecutor's Office on November 7, 2022, with investigation no. 2022/150348 and indictment no. 2022/6350. The evaluation will be conducted in accordance with Turkey's domestic law and international human rights law to determine whether the indictment adheres to these standards. The report is divided into four sections. Section 1 introduces the report (this section). Section 2 provides a brief summary of the background information on the case. Section 3 presents a legal analysis of the indictment. Section 3.2 assesses the indictment in light of international standards: Articles 6, 10, and 18 of the European Convention on Human Rights (ECHR) and the UN Basic Principles on the Role of Lawyers. Section 3.3 briefly draws attention to the relationship between domestic law and international law. Finally, section 4 offers a brief conclusion.

2. Summary of Case Background Information

Aryen Turan is a lawyer registered with the Izmir Bar Association. She is a member of Board of Directors of the İzmir Branch of the Association of Lawyers for Freedom.[1]

Under Article 37 of the Regulation on the Law of Advocacy of the Union of Bar Associations of Turkey, Aryen Turan, as a member of the Board of Directors, has the right to speak at General Assemblies of the İzmir Bar Association. Aryen Turan exercised this right at the Assembly of the İzmir Bar Association on 22 and 23 October 2022, where she read a text to the Assembly. During her speech, she addressed issues within the judiciary, the legal profession, and human rights violations in Turkey. Additionally, she briefly mentioned, the existing reports of the Turkish Armed Forces (TSK) using chemical weapons in its transborder operations.[2]

A small group of lawyers protested against Aryen Turan after her speech, mainly due to her allusion to an independent investigation into the allegations of Turkey's military operations' use of chemical weapons. Furthermore, she was targeted by various media outlets, and it was learned from the press that a criminal investigation was initiated. On November 3, 2022, Turan was detained by the İzmir Anti-Terror Branch Teams.[3]

Though there was no warrant for a search and seizure, Turan's cellphone was seized. Moreover, Turan's family nor her lawyers Türkan Aslan Ağaç and Ali İhsan Güven, whose names were provided to the police by Turan, were notified about her detention. Aryen Turan was not informed about the criminal charge against her. Even though there is no official restriction on examining the documents related to Turan's accusation, the examination was effectively restricted.[4]

On November 4, 2022, Turan was taken to the public prosecutor's office and her statement on the allegation of aiding and abetting the PKK organisation was taken. The İzmir Chief Public Prosecutor's Office prepared an indictment against Turan, which was subsequently transferred to the 18th High Criminal Court in İzmir. The indictment was issued 7 November 2022. The court accepted the indictment and opened a public case.[5]

The indictment accuses Lawyer Aryen Turan of "Aiding and Abetting the Organisation Knowingly and Willingly [PKK/KCK]". The applicable articles referred to in the indictment are Article 314/2 of the Turkish Penal Code (TPC) by the implication of the Articles 220/7 and 314/3 of the TPC no. 5237, Article 5/1 of the Anti-Terror Law no. 3713, and Articles 63, 53/1 and 58/1 of the TPC.[6]

3. Analysis of the Indictment

3.1 Introductory Remarks and Formalities

Although the indictment is lengthy, it lacks a clear and concise summary of the facts. The indictment starts with formalities, such as the place, the date and time period of the alleged crime, the description of the offence, the time spent under detention and the evidence of the offence. The following pages contain a collection of various texts about the organisation PKK/KCK and references to media publications posted by the organisation and organisations that support it.[7] This descriptive section concludes with a statement that was released by the Turkish Armed Forces on October 20, 2022, which states that the accusations regarding the use of chemical weapons are "baseless and untrue".

The specifics of the case of Aryen Turan are only addressed from page 6 of the indictment. The indictment notes that Turan's statements were "in line" with the media publications previously outlined. To support this claim, transcripts of Turan's speech posted on YouTube, a transcript of her speech at the İzmir Bar's General Assembly, and her statement made on November 4, 2022, are presented.

The statement that Turan is being prosecuted for is quoted on page 7 of the indictment, and reads:

> *"In national and international media, information is being published that Turkey is using chemical weapons in military operations, despite the fact that it is prohibited by the international conventions. However, no explanation has been given by the authorities to date, other than denying it and stating that it is being investigated."*

As to these statements, the Indictment holds that Aryen Turan "voiced the claim that Turkish Armed Forces used chemical weapons during its operations and thus committed the offence of willingly and knowingly aiding and abetting the PKK/KCK armed terrorist organisation with the aim of ensuring the operations against the organisation are terminated."[8]

3.2 Evaluation of the Indictment Under International Standards

Article 90 of the Constitution of the Republic of Turkey states that international law has the force of the domestic law, but in case of dispute, international conventions shall prevail. Therefore, all organs of the Turkey are bound by international law, among which international treaties to which Turkey is a State Party. This means that organs of Turkey, among which the judiciary, when carrying out their functions in a domestic context, are obliged to give effect to international law.

Turkey has been a State Party to the European Convention of Human Rights (ECHR) since 1954. Therefore, all citizens of Turkey are protected by the standards that are set out in the Convention. The ECHR establishes a minimum set of standards which must be secured to those within the jurisdiction of each contracting State.

3.2.1 Article 10, ECHR: Freedom of Expression

Article 10/1 of the ECHR states:

> *"Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises."*

The article enshrines the right to freedom of expression, which allows individuals to hold opinions without interference by the State. This right has been recognized as one of the essential foundations of a democratic society and a prerequisite for personal fulfillment and societal progress[9] which underpins the protection of other rights.[10]

> Turkey has been a State Party to the European Convention of Human Rights (ECHR) since 1954. Therefore, all citizens of Turkey are protected by the standards that are set out in the Convention. The ECHR establishes a minimum set of standards which must be secured to those within the jurisdiction of each contracting State.

To conduct a comprehensive assessment of Turan's right to freedom of expression, it is necessary to analyze the statements for which she is being charged and the context in which she delivered them.

As mentioned above, Turan's alleged offense centers around one comment she made in her speech at the General Assembly of the İzmir Bar Association on 22 October 2022. Her statement, as quoted in the indictment, reads:

> *"In national and international media, information is being published that the Turkish State is using chemical weapons in military operations, despite the fact that it is prohibited by the international conventions. However, no explanation has been given by the authorities to date, other than denying it and stating that it is being investigated."*

This statement is a factual statement, stating i) that (international) media have reported the possible use of chemical weapons; ii) that the use of chemical weapons is prohibited by international law; iii) that no explanation has been given about these reports by the government. Furthermore, the statement is very general in nature and therefore not of a controversial nature, based on facts that are available to anyone. Their truth can be easily verified – as will be demonstrated below.

It must be emphasized that Turan's statement did not make any direct accusations, but rather alluded to the media's publication of information about the Turkey's alleged use of chemical weapons. By stating that "information is being published", no value judgements regarding the allegations of the use of chemical weapons was made. On the contrary, Turan merely asserted that such statements are currently unproven. Finally, she was simply drawing attention to the fact that the authorities have given no explanation to date about the publications about the use of chemical weapons. This part of her statement is supported by the facts, as Turkey had given little explanation about this issue at the moment the speech was made.

Furthermore, Turan's statement should be contextualized within the wider public discourse on the use of chemical weapons, which is a significant and pressing issue both nationally and internationally. Turan's speech merely reflects a part of the current discourse, information, and views propagated in various news articles and reports. Several news articles and reports have made similar statements. One example is the British BBC, which has reported about cases similar to thet of Turan.[11] Another example is the Nordic Research and Monitoring Network, which published an article on September 12, 2022, reporting that Russia had accused Turkey of planning to equip drones with chemical weapons.[12] Finally, in September 2022, the international NGO *International Physicians for the Prevention of Nuclear War* (IPPNW) published a report of an independent investigation carried out in Northern Iraq, which compiled various pieces of evidence that could indicate the use of chemical warfare agents that are in violation of the Chemical Weapons Convention. The report concluded by urgently appealing to the international community to facilitate an independent international fact-finding mission.[13] None of these media outlets can be said to support terrorist activities, or any other activities detrimental to Turkey. All these news articles and reports contain only factual information, some of which similar to the statements issued in Turan's speech.

Finally, it is essential to consider why Turan included this statement in her speech. As per Article 76/1 of the Law on Lawyers, bar associations have a key responsibility to identify and report activities that are in violation to their core purposes and functions, and they must ensure the implementation of the rule of law. As a member of the İzmir Bar Association, speaking at the Bar's General Assembly, Turan had the duty to fulfill these responsibilities.[14]

As such, Turan's comments can be reasonably interpreted as an attempt to inform and contribute to a public discourse on threats to the rule of law, rather than to incite hatred or violence. This is supported by the fact that both Turan and the association have expressed that the intentions of the speech were to inform the bar association's administration about the reports on the use of chemical weapons, with the aim of working together to find solutions.[15]

The protection of the right to freedom of expression varies depending on the context in which it is exercised. In the case of lawyers, the ECtHR has recognized that they play a crucial role in the administration of justice, and thus, their right to freedom of expression is accorded special consideration and protection.[16] The ECtHR case law on Article 10 ECHR outlines that lawyers 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 and recognizes the unique position of lawyers in the administration of justice. Lawyers are key actors in the justice system, directly involved in its functioning. [17]

For example, in the seminal case of *Morice v. France*[18] the ECtHR elaborated on the high level of protection that is accorded to lawyers:

> *"The specific status of lawyers gives them a central position in the administration of justice as intermediaries between the public and the courts (…) Lawyers are thus entitled, in particular, to comment in public on the administration of justice, provided that their criticism does not overstep certain bounds. Those bounds lie in the usual restrictions on the conduct of members of the Bar, as reflected in the ten basic principles enumerated by the CCBE for European lawyers, with their particular reference to "dignity", "honor" and "integrity" and to "respect for ... the fair administration of justice" (…).*
>
> *The question of freedom of expression is related to the independence of the legal profession, which is crucial for the effective functioning of the fair administration of justice. It is only in exceptional cases that restriction – even by way of a lenient criminal penalty – of defence counsel's freedom of expression can be accepted as necessary in a democratic society."* [19]

In the *Morice* case, the ECtHR emphasized that restrictions of the right to freedom of expression were reserved for "gravely damaging attacks that are essentially unfounded", which had not been made in the case.[20]

Furthermore, when the matter in question concerns public interest, it is established case law of the ECtHR that:

> *"[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 (...). A degree of hostility and the potential seriousness of certain remarks do not obviate the right to a high level of protection, given the existence of a matter of public interest.*[21]

As outlined above, the statements of Aryen Turan for which she was prosecuted are statements of fact of a very general nature, based on widely reported facts that are available to anyone, of which the truth can be easily verified. At no point this statement overstepped the bounds outlined in the professional code of the CCBE. Neither was her factual statement a "gravely damaging and essentially unfounded attack". Finally, Turan was speaking in her capacity as a lawyer, regarding a matter of public interest and with a goal to improve the administration of justice.

It follows from the above that her statements were fully covered by the freedom of expression as protected by Article 10/1 of the ECHR. Therefore, the present indictment and prosecution are a direct violation of this right by Turkey.

Article 10/2 of the ECHR sets out the circumstances under which States may restrict the right to freedom of expression. Three assessment criteria are used to determine whether such restriction does not violate the right to freedom of expression. A restriction must be "prescribed by law", it must pursue "a legitimate aim" within the meaning of Article 10/2, and, lastly, a restriction must be "necessary in a democratic society".

In the majority of cases, it is the latter question that determines the outcome of a given case.[22] In its case law, the ECtHR has developed the autonomous concept of whether the interference is "proportionate to the legitimate aim pursued". As a general principle, the "necessity" of any restriction must be convincingly established, and the restriction must be relevant, sufficient, and proportionate to its intended purpose.

In the 2017 *Beslan School Siege case*, the ECtHR held that States have the right to take preventative measures to prevent terrorism or the incitement of violence. However, States must discharge these obligations in a manner that respects human rights and the rule of law, including the freedom of expression. [23] Thus, the principles regarding freedom of expression also apply to measures taken to safeguard national security and public safety as part of counter-terrorism efforts. To impose limitations based on national security, the perceived risk must not be theoretical or vague. The risk must involve at least a "reasonable risk of serious disturbance" to the public order in a democratic society. Only then can a restriction on freedom of expression be deemed reasonable and lawful.

To determine this, the ECtHR "look[s] at the interference in the light of the case as a whole to determine whether the restriction is proportionate, including the content of the impugned statements and the context in which they were made". [24] For crimes of expression to be prosecuted it is essential to establish a direct connection between the words spoken and the actual and intended harm or risk posed. If there is no reasonable relationship between the individual's expression and the alleged harm or risk, then the link is too remote to establish individual responsibility.[25]

Also relevant to the present case is the case of *Ali Gürbüz v. Turkey.* [26] It also involved restriction of the freedom of expression and prosecution under Turkey's Anti-Terrorism Law no. 3713. In this case, Mr Gürbüz had criminal proceedings brought against him for publishing statements by the leaders of organisations characterized as terrorist under Turkey's domestic law. These messages did not call for any violence, armed resistance or uprising, and did not constitute any hate speech.

The ECtHR held that if a State initiates criminal proceedings against individuals for publishing statements, without considering the content of these statements or their contribution to public debate, they can be seen as attempting to use criminal law to (systematically) suppress such publications. The ECtHR stated that that is incompatible with the freedom to receive or impart

information and ideas.[27] Therefore, the court decided that the impugned measure did "not meet a pressing social need, that it was by no means proportionate to the legitimate aims sought to be achieved and that, therefore, it was not necessary in a democratic society." [28] Consequently, the ECtHR held that Turkey had violated Article 10 of the ECHR.

The case law outlined above may be applied to the case of Aryen Turan. In the first place because her case is very similar to the case mentioned above and the established case law of the ECtHR can serve as a precedent in the present case. In the second place, that is even more so as Turan is not a media professional but a lawyer, for which when the content is related to the legal issues the threshold for restricting their freedom of expression is even higher.[29]

It follows from the above, and it is submitted here, that the restriction of the freedom of expression of Aryen Turan by the authorities of Turkey was not permitted by Article 10/2 of ECHR.

3.2.2 Article 18, ECHR: Limitation on Use of Restrictions on Rights

Article 18 ECHR reads as follows:

> *"The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed".*

Article 18 has an auxiliary function, meaning that it can only be invoked in conjunction with another Convention right. However, a violation of Article 18 can still be found regardless of whether the right that was invoked in connection with it was violated.

Examples are to be found in *Demirtaş v. Turkey* (no. 2) [GC] and *Kavala v. Turkey*. In these cases the ECtHR observed an ongoing pattern of oppression of political dissent, human rights defenders, journalists and lawyers in Türkiye. In both cases the Court found a violation of Article 18 ECHR.

In Demirtaş, the Court stated that:

> *"[I]t has been established beyond reasonable doubt that the applicant's detention … pursued the ulterior purpose of stifling pluralism and limiting freedom of political debate, which is at the very core of the concept of a democratic society."*[30]

The significance of the Grand Chamber judgment cannot be overstated, it sends a powerful and clear message to governments that have the duty to recognize and protect the freedoms that political dissidents enjoy in a democratic society governed by rule of law.

Similarly, in *Kavala*, the Court concluded that the "restriction of the applicant's liberty was applied for purposes other than bringing him before a competent legal authority" and that:

> *"[T]he prosecution's attitude could be considered such as to confirm the applicant's assertion that the measures taken against him pursued an ulterior purpose, namely to reduce him to silence as an NGO activist and human-rights defender, to dissuade other persons from engaging is such activities and to paralyse civil society in the country."*[31]

As it has been observed by many, the targeted harassment of human rights defenders in Turkey is part of a wider practice of arbitrary detentions and abusive prosecutions of journalists, elected politicians, lawyers, and other perceived government critics. This practice has been well-documented in many reports by the Council of Europe, the European Union, and human rights organisations.[32]

Considering the broader context in which the indictment against Aryen Turan was issued, we can see a pattern of oppression of dissent in Turkey that provokes a chilling effect on the right to freedom of expression and causes the deterioration of the rule of law. It is argued here that her indictment was issued with the purpose of silencing her as a prominent figure advocating for human rights and the rule of law in Turkey.

3.2.3 Article 6, ECHR: Right to a Fair Trial

Article 6 of the ECHR provides for the right to a fair trial. This right is a fundamental human right and is essential to establishing a rule of law. The article sets out various guarantees to ensure that everyone charged with a criminal offence is given a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

The ECtHR has formulated several relevant starting points to assess whether the indictment is in accordance with the right to fair trial. [33] 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.

Two aspects of the rights under Article 6 are relevant to this case. Firstly, every person is entitled to access the documents relevant to their case, to be informed about the charge against them and to have legal representation. Secondly, the guide on Article 6 addresses the defendant's 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 characterization given to those acts. 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.[34]

Aryen Turan's rights and guarantees under Article 6 ECHR were violated by the authorities in the following instances.

First, Aryen Turan was not informed about the criminal charge against her. In addition, her lawyers, whose names were given to the police by Aryen Turan, were not informed by the authorities that Turan had been arrested and detained. Also, no documents pertaining to her arrest were given to Aryen Turan or to the lawyers that were allowed to visit her during her arrest.

Second, even though Aryen Turan understands the Turkish language in which the indictment is written, due to the poor organisation and contents of the indictment it is very difficult to comprehend the actual content. The largest part of the indictment contains general descriptions of the PKK/KCK organisation and its media posts but fails to effectively connect the alleged crime with the evidence. This leads to the defendant being unaware of the nature of the crime she is accused of. Furthermore, no sufficient legal or factual grounds are given to prove that Aryen Turan has committed the alleged crime.

3.2.4 UN Basic Principles on Role of Lawyers

In analysing the indictment, attention must be paid to the UN Basic Principles on the Role of Lawyers.

The United Nations Basic Principles on the Role of Lawyers (the "UN Basic Principles")[35] is an instrument developed within the framework of the United Nations in 1990. It is the only international instrument which sets out principles that underlie and safeguard the practice of the legal profession.[36]

The UN Basic Principles do not create legal obligations in the same vein as a treaty would. However, some of these principles are binding on States by virtue of the interpretation (by regional tribunals) of human rights treaties, as well as through binding domestic case law.

The UN Basic Principles refer to a broad range of issues, such as entry into the profession and access to counsel. However, some of its most important and often cited principles (Principles 16-18, 23 and 24) refer to the independence of the legal profession, understood as the ability of lawyers to practice their profession without intimidation, hindrance, harassment, or improper interference. Of these core principles, the following are especially relevant in the present case.

Principle 16, on the "Guarantees for the functioning of lawyers", states that:

> *"Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) …; 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".*

By prosecuting Aryen Turan for a statement made while carrying out het professional tasks, the authorities have violated this Principle 16.

Principle 22, on the "Guarantees for the functioning of lawyers", states that:

> *"Governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential."*

The seizure of the mobile telephone of Aryen Turan violated this Principle 22, as it constituted a direct infringement of the confidentiality between her and her clients and peers.

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."*

As argued extensively in this report, the authorities have grossly violated the freedom of expression of Turan. In doing so, this Principle 23 was also violated.

In the light of these Articles and given the above analysis, the statement of Aryen Turan included in the indictment would merit protection instead of prosecution.

3.3 Evaluation of the Indictment Under Turkey's Domestic Law

An examination of Article 170 and other relevant provisions of the Criminal Procedure Code in Turkey shows that the written regulations on indictments and investigations are in line with international law. Similarly, the protection of lawyers and the obligation of prosecutors to protect human rights apply to all States, including Turkey, where the rule of law must prevail. As such, it is not possible to expect that an indictment that does not coincide with international law is in compliance with Turkey's domestic law. Moreover, the fact that the indictment includes many details other than Aryen Turan's act (her speech and its relation to the offence), which are irrelevant to the case, points to an additional violation in the context of Turkey's domestic law. Again, the fact that the indictment does not include any assessment that Aryen Turan's speech at the general assembly of the bar association was part of her professional activity as a lawyer shows that the prosecutor did not fulfil his responsibility to compile the facts in favor of the suspect.

4. Conclusion and Recommendations

In light of the foregoing, we conclude that the criminal charges brought against Aryen Turan fail to comply with Turkey's obligations under international and European human rights law, in particular the right to freedom of expression. As such, the charges constitute an unlawful restriction on the right to freedom of expression under Article 10 of the ECHR. It follows that, should Aryen Turan be convicted, her conviction would equally constitute an unnecessary interference with the right

to freedom of expression. Also, this indictment and the procedure violate Articles 6 and 18 of the ECHR. Moreover, this indictment contravenes the UN Basic Principles on the Role of Lawyers.

In the light of all these considerations, the most fundamental recommendation that can be given to the judicial authorities of Turkey would be to adopt the application of international law to which Turkey is a party as a priority principle, regardless of the characteristic of the case before them.

Endnotes

1 PEN Norway, "Background Information on the Indictment of Aryen Turan" (PEN Norway, February 16, 2023).
2 Ibid.
3 Ibid.
4 Ibid.
5 Ibid.
6 Ibid.
7 K.H v Aryen Turan, No. 2022/6350, High Criminal Court of Ankara, November 7, 2022.
8 Ibid. p. 9-10.
9 Dichand and Others v Austria, no 29271/95, Judgment of 26 February 2002, par. 37; Handyside v. United Kingdom, 7 Eur. Court H.R. 413 (1976).
10 "Guide on Article 10 of the European Convention on Human Rights Freedom of Expression" (Council of Europe, ECtHR 2022) (hereinafter "Guide on Article 10").
11 "Turkey doctors' chief sentenced over call for chemical weapons inquiry", https://www.bbc.com/news/world-europe-64236416.
12 Abdullah Bozkurt, "Russia Accused Turkey of Planning to Equip Bayraktar Drones with Biological/Chemical Weapons - Nordic Monitor," nordicmonitor.com, September 12, 2022, https://nordicmonitor.com/2022/09/russia-accused-turkey-of-planning-to-equip-bayraktar-drones-with-bio-chemical-weapons/.
13 Josef Savary et al., "Is Turkey Violating the Chemical Weapons Convention? An Independent Investigation into Possible Violations of the Chemical Weapons Convention in Northern Iraq Is Urgently Needed," September 2022, https://www.ippnw.de/commonFiles/bilder/Frieden/2022_IPPNW_Report_on_possible_Turkish_CWC_violations_in_Northern_Iraq.pdf.
14 PEN Norway, "Background Information on the Indictment of Aryen Turan" (PEN Norway, February 16, 2023).
15 Ibid.
16 Sarah Maguire, Ishaani Shrivastava, "Freedom of Expression and Its Relationship with the Right to Respect for Private Life and the Right to a Fair Trial," March 2017, https://rolplatform.org/wp-content/uploads/2018/03/free_expression_guide-eng.pdf.
17 "Guide on Article 10", par. 468 ff.
18 Morice v. France, no. 29369/10, Judgment of 23 April 2015 [GC].
19 Ibid. par 132-135.
20 Ibid. par 168.
21 Guide on Article 10, par. 488-492.
22 Ibid.
23 Tagayeva and Others v. Russia, no. 26562/07, Judgment of 13 April 2017.
24 Ibid.
25 Ibid.
26 Ali Gürbüz v. Turkey, no. 52497/08, Judgment of 12 March 2019.
27 Ibid. par. 77.
28 Ibid. par 78
29 See Morice v France, discussed above.
30 Selahattin Demirtaş v. Turkey (No. 2), no. 14305/17, Judgment of 22 December 2020, par. 437.
31 Kavala v. Turkey, no. 28749/18, Judgment of 10 December 2019, par. 224-230.
32 "Turkey: Release Osman Kavala"; "Submission by Human Rights Watch, the International Commission of Jurists, and the Turkey Human Rights Litigation Support Project" (Human Rights Watch, 2020), https://www.hrw.org/node/376936/printable/ print.
33 "Guide on Article 6" (Council of Europe, ECtHR, 2014) (hereinafter "Guide on Article 6").
34 Ibid.
35 https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-role-lawyers.
36 At a regional level in Europe, recommendations issued by the Committee of Ministers of the Council of Europe "on the freedom of exercise of the profession of lawyer"
specifically address the legal profession"(https://www.coe.int/en/web/cdcj/cj-av).

PEN NORWAY

Another Barrier for Journalism: **“The Disinformation Law”**

Article

Turkey’s so-called Disinformation Law exposes not only journalists but all social media users to prosecution for nearly any public comment. This article documents how vague legal language is being weaponized to suppress free expression, stifle dissent, and punish truth-telling.

Another Barrier for Journalism: "The Disinformation Law"

Article*

Introduction

Initially reported in the media as the "censorship law" and often referred to in shorthand as the disinformation law, namely Article 217/A of the Turkish Penal Code (TPC), which criminalizes the act of "publicly disseminating misleading information", was enacted through Article 29 of Law No. 7418, on 13 October,2022.

This law paves the way for journalists and, more broadly, all individuals engaging in public discourse, including social media users, to be subjected to criminal sanctions for every statement they make.

In a report it published two years ago regarding the meaning of disinformation, the Anadolu Agency, the mouthpiece of the ruling power, explained the possible ramifications of the concept as follows: "Disinformation is a frequently employed method for shaping public opinion or inciting chaos through distorted and false information. Disinformation activities typically begin with minor bits of information being spread among society by certain individuals and groups, gradually escalating to a level that can provoke public outrage. Unverified information, whether unintentionally or deliberately amplified by social media users, swiftly manipulates the masses and exacerbates disorder on a larger scale."

Commenting on the debate surrounding such news and the law which—the government claims—was introduced "to combat disinformation and fake news", Mahir Ünal, the Deputy Chair for the Parliamentary Group of Justice and Development Party (AKP) stated that the legislation did not amount to "censorship":

"Article 218 of the Turkish Penal Code is clear. Expressions of thought intended as criticism and remaining within the bounds of reporting do not constitute a criminal offense. Full stop... Disinformation does not simply mean an insult. Disinformation does not simply mean the act of spreading false information. Disinformation is the deliberate, coordinated dissemination of such content over a specific period, aimed at achieving a particular objective. It will be up to the courts to determine whether a given piece of information or news is misleading... Someone predicting that the dollar will rise to 40 lira or a scientist sharing earthquake forecasts does not fall within the scope of this crime. If you read the law, you will see this clearly."

It is noteworthy that Ünal used the dollar as an example, given that researcher and author Erol Mütercimler was taken to court over a prediction he made in 2016 on a television program regarding the U.S. dollar exchange rate—he had stated it would reach 10 lira. By the time his trial concluded, the dollar had already climbed to 19 lira. Mütercimler was not the only person to face prosecution over such predictions.

In short, the implementation of this regulation did not unfold as Mahir Ünal had described. Not only journalists but also numerous social media users found themselves before the courts facing these charges.

33 Arrested, 12 Sentenced

In November of last year, Nurettin Alan, AKP MP and Justice Committee member shared the statistical data by the Ministry of Justice regarding the regulation, which enforces prison terms of up to three years.

According to data recorded in parliamentary proceedings and reported by Media and Law Studies Association (MLSA), in the two years between October 18, 2022, and October 10, 2024, a total of 4,590 individuals were investigated on charges of "publicly spreading misleading information."

In 2022, a total of 216 individuals were listed as suspects in 139 investigation files opened under this charge. In 2023, the number rose to 2,515 suspects across 2,381 investigation files. By October 10, 2024, 1,859 individuals had been named as suspects in 1,668 investigations.

The data shows that 223 and 161 investigations proceeded to trial in 2023 and 2024, respectively. Among the cases filed in 2023, five resulted in convictions, 72 in acquittals, and 15 in rulings of Suspension of the Pronouncement of the Judgement (SPJ). In 2024, seven cases ended in convictions, 77 resulted in acquittals, and 16 in SPJ.

Due to this law, a total of 33 people were arrested—3 in 2022, 24 in 2023, and 6 in 2024. However, no official figures have been disclosed regarding the number of individuals placed in detention.

According to MLSA data, at least 56 journalists, writers, website administrators, and webpage owners faced 66 different investigations on charges of "publicly disseminating misleading information" prescribed under Article 217/A of the Turkish Penal Code, on the grounds of the news reports, commentary, and social media posts they published.

Journalist Ahmet Kanbal was subjected to four separate investigations, meanwhile other journalists İsmail Arı and Gökhan Özbek each faced three. Meanwhile, Medine Mamedoğlu, Oktay Candemir, Fırat Bulut, Dinçer Gökçe, and Zübeyde Sarı were the subjects of two investigations each.

Seven Journalists Arrested

Journalists Mehmet Güleş, Fırat Bulut, Serdar Akinan, İlknur Bilir, Dinçer Gökçe (twice), Cengiz Erdinç, Sinan Aygül, Ali İmat, İbrahim İmat, Nilay Can, Gökhan Özbek, Furkan Karabay, and Tolga Şardan were detained under this charge. Sinan Aygül, Ali Imat, İbrahim Imat and Tolga Şardan were arrested.

This accusation was particularly applied in cases against journalists reporting on the February 6, 2024 earthquakes, the mining disaster in İliç, Elazığ, and election coverage.

According to data from the Journalists' Union of Turkey (JUT), between October 2022 and April 2024, a total of 46 investigations were launched against 40 journalists under this charge, leading to the detention of 10 journalists and the arrest of four. These investigations resulted in 14 court cases, five of which concluded with acquittals. One trial resulted in a 10-month prison sentence, while trials are still ongoing in eight others. (The JUT report also states that 13 journalists and media workers are currently imprisoned on various charges, while hundreds of journalists continue to face prosecution.)

Investigations and Trials on Each and Every Issue

Due to the vague wording of the regulation and the ambiguous nature of the crime's elements, virtually any news report can become the subject of legal proceedings.

For instance, Halktv.com.tr's Editor-in-chief Dinçer Gökçe and Gazete Pencere's Editor-in-chief Nilay Can were detained on charges of "publicly disseminating misleading information" as part of an investigation launched over news reports stating that the prosecutor who dismantled the "Neonatal Care Gang" had been removed from the case. As part of the same investigation, 23 news websites and 13 social media accounts were also examined. The two journalists were later released under judicial control measures.

In December 2024, the Chief Public Prosecutor's Office of İstanbul launched an ex officio investigation against journalist Özlem Gürses on suspicion of "publicly disseminating misleading information" due

to remarks she made about the Turkish Armed Forces in a video published on her YouTube channel. Gürses was detained and later released on December 21 under judicial supervision measures, including house arrest and a travel ban. Until February 12, when the judicial restrictions were lifted, she continued hosting her TV program from home.

Another investigation was initiated against journalist Furkan Karabay over his news reports and social media posts concerning the legal process involving Ahmet Özer, the Esenyurt mayor who had been replaced by a government-appointed trustee. Karabay was detained on November 8, 2024, and arrested on November 9. He remained in prison for nine days.

Journalist Ruşen Takva became the subject of an investigation by the Chief Public Prosecutor's Office of Van on suspicion of "publicly disseminating misleading information" due to a post he shared on December 3, 2024, concerning Turkey's policy toward the Kurds in Syria.

Likewise, on December 21, 2024, the Investigation Bureau for Terrorism Offences of the Chief Public Prosecutor's Office of Istanbul launched an investigation into the T24 news website and Gerçek Gündem's Editor-in-Chief, journalist Seyhan Avşar. The basis of the investigation was the suspicion that they were "conducting terrorist propaganda" and "disseminating misleading information to the public" through their reporting and social media commentary regarding the deaths of journalists Cihan Bilgin and Nazım Daştan in Syria.

In other words, journalists have faced investigations—and, in some cases, detention and arrests—over a wide range of news reports and analyses. Even when their reports are based on accurate information and relevant documents are presented to the courts, the legal proceedings do not cease.

Constitutional Court Rejects Appeal

Legal objections to the law were dismissed by the High Court as well.

The Constitutional Court, in its ruling on the annulment request, emphasized that "the speed at which information spreads has significantly increased due to technological advancements" and stated that "the replacement of truth with falsehoods adversely affects individuals' capacity to develop independent opinions."

In its session on November 8, 2023, the Constitutional Court rejected the annulment request, ruling by a vote of 7 to 5 that the provision was not unconstitutional. In its reasoned judgement, the Court maintained that the provision fulfilled the principle of legality, asserting that the material and moral elements of the crime, the severity and type of sanctions imposed, and the aggravated forms of the offense were all explicitly and unequivocally outlined. Therefore, it claimed that the provision was neither vague nor unpredictable.

As a result, objections asserting that the vague wording of the law grants the judiciary excessive discretionary powers and violates freedom of expression and press were not upheld by the High Court.

"Yet Another Weapon": Agents of Influence Law

While investigations and lawsuits against journalists under this law continue, the arrest of talent agent Ayşe Barım—based on the proposed but not yet enacted provision on the "agents of influence"—indicates that the judiciary has crossed another critical threshold.

The Journalists' Association of Turkey's assessment of the "agents of influence" provision, which has so far only been approved at the parliamentary committee stage, underscores the gravity of the situation: "This provision will make it impossible to determine who or what will be punished. It will serve as a tool to suppress information and opinions that cause public outrage, shock, or discomfort. The regulation is vague and lacks clarity in defining what it criminalizes. It is neither explicit nor comprehensible. This provision will harm press freedom and freedom of thought and expression, potentially becoming yet another weapon wielded against journalists."

* The author has chosen to remain anonymous. Their identity is known to PEN Norway.

PEN NORWAY

Agents of Influence Bill: **A Path to Mass Criminalisation**

Article by Burcu Karakaş

The proposed "agent of influence" law in Turkey paves the way for labeling individuals as foreign agents simply for expressing their opinions. This article exposes how, under the pretext of national security, the draft legislation targets journalists, human rights defenders, and civil society.

Agents of Influence Bill:
A Path to Mass Criminalisation

Author: Burcu Karakaş

The draft bill, commonly referred to as “agents of influence” in public discourse in Turkey, was proposed as an amendment to the Turkish Penal Code under Article 16 of the “Bill on Amendments to the Notary Law and Certain Other Laws.” After the approval by the Parliamentary Justice Commission, however, it was withdrawn in November 2024 before it was sent to the Plenary Session of the Grand National Assembly of Turkey (TBMM).

With this move, this controversial bill was shelved for the second time within the same year. While this marks an important success, the threat has not been entirely eliminated, as there remains a possibility that the draft will be revised and put on the national agenda once again. So, why is this bill considered a “threat”?

The provision in the draft bill states, “Those who commit crimes against the security or internal or external political interests of the state in line with the strategic interests or instructions of a foreign state or organisation will face imprisonment of three to seven years.”

Controversial Regulation: How Big is the Threat?

This bill, which has the potential to enable the government to indiscriminately target any group it perceives as “oppositional,” carries the risk of being weaponized to criminalise civil society organisations, journalists, and social media users exercising their right to free expression.

Ever since the provision was introduced, Turkey’s civil society sector and press organisations have been persistently working to increase public awareness, prompting opposition parties to take action as well. Human rights advocates and legal experts particularly emphasize the draft law’s vagueness and its susceptibility to arbitrary application.

Claiming that the bill is an instrument of oppression that ignores the most basic principles of law, the CHP’s (Republican People’s Party) Muğla MP Gizem Özcan, a member of the Justice Commission of the Grand National Assembly of Turkey, stated that the article is “vague” and open to “arbitrary” interpretations, and said, “It has been drafted under the assumption that merely being an opponent is sufficient, without any need to prove the link between the act and the perpetrator. The aim is to gag, intimidate and criminalise journalists, academics, civil society representatives and young people.”

Özcan points out that the phrase “against the security or political interests of the state,” as stated in the legal text, is a frequently used yet vague concept in the Turkish Penal Code. She adds that the lack of a clear and precise definition of the crime grants the judiciary unlimited discretionary power, paving the way for individuals to be sentenced based solely on suspicion, without the need for concrete evidence.

Criticism from the Human Rights Defenders and Legal Experts

Amnesty International's Turkey Country Director, Ruhat Sena Akşener, also highlights that the bill contains "extremely vague language" and emphasizes its potential for political or circumstantial misuse. She told PEN Norway, "This bill enables the arbitrary criminalization and punishment of human rights defenders, civil society activists, and journalists by misrepresenting lawful actions as offenses."

Akşener argues that the draft bill contains overly broad and vague notions such as "strategic interest," "instruction," "organisation," and "the internal or external political interests of the state," without specifying how these terms will be identified, and that the meaning of "internal and external political interest" remains unclear and unpredictable... She stresses that should the bill be enacted, any undefined and vague "acts" carried out "against the security or internal or external political interests of the state in line with the strategic interests or instructions of a foreign state or organisation" will be classified as criminal offences.

"Amnesty International's Turkey Country Director, Ruhat Sena Akşener, also highlights that the bill contains "extremely vague language" and emphasizes its potential for political or circumstantial misuse. She told PEN Norway, "This bill enables the arbitrary criminalization and punishment of human rights defenders, civil society activists, and journalists by misrepresenting lawful actions as offenses."

Akşener also points out that the draft law violates the "principle of legality in crime and punishment," which includes the fundamental legal concept of foreseeability and that this situation contradicts international law as well as Turkey's constitution and domestic legal framework. Similarly, Gizem Özcan argues that the bill is in clear violation of the Constitution, and says "The vague nature of such a definition of an offence contradicts with the principles of the rule of law, as outlined in Article 7 of the European Convention on Human Rights and Article 15 of the International Covenant on Civil and Political Rights both of which Turkey is a signatory."

Ruhat Sena Akşener argues that the "agents of influence" bill is a continuation of the longstanding pressures on civil society and the press in Turkey, following laws such as the "Disinformation Law" and the "Law on the Prevention of Financing of Proliferation of Weapons of Mass Destruction."

Civil society and human rights organisations, which are already struggling to operate under existing restrictive and vague laws while carrying out advocacy, monitoring, and reporting efforts, will find it very difficult to determine what actions might classify them as 'agents of influence' under this bill.

CHP MP Özcan, on the other hand, points out that the offences similar to the one in the bill are usually punishable with aggravated life imprisonment. This is precisely why, she believes, the three to seven years' imprisonment the bill prescribes for the "agents of influence" was deliberately chosen by the government. According to Özcan, should the bill enacted into a law, it will pave the way for a much broader segment of society to be easily criminalised. She told PEN Norway,

"If a person is being prosecuted not only for the crime of 'acting as an agent of influence' but also for another offense, they could

be sentenced for both charges simultaneously. This effectively grants authorities the power to apply the law selectively depending on the individual."

Also a lawyer, Gizem Özcan considers the "agents of influence" bill as a "law of intimidation" and argues that the government seeks to create a climate of fear by undermining press freedom and freedom of expression.

Examples from Other Countries: Russia, Georgia, and Hungary

Turkey's "agent of influence" bill has parallels in other parts of the world. Human rights defenders state that this bill mirrors the authoritarian wave that originated in Russia and expanded further, with similar laws being modelled after examples not only from Russia but also from Hungary and Georgia.

Dr. Sonja Schiffers, Director of the Heinrich Böll Stiftung Tbilisi Office, views Georgia's "foreign agent" law, which came into effect last year, as evidence of "authoritarianism through legal means" and argues that the law was designed to provide legal legitimacy for the repression of civil society and independent online media. She points out that while there have been evaluations in Georgia indicating that the law contradicts both the constitution and international legal norms, the judiciary in the country is not independent.

"Human rights in Georgia are deteriorating," Schiffers told PEN Norway, adding that although the ruling Georgian Dream Party has yet to enforce the "foreign agent" law passed in May 2024, the legislation has already caused concerns.

Similarly, in Turkey, the bill is yet to be enacted but it already had tangible effects. A striking example is the prosecution's referral document of Ayşe Barım, a talent manager who was detained within the scope of the Gezi Park investigation and arrested on January 27 on charges of "aiding an attempt to overthrow the government." The referral document stated that actors represented by Barım's management company had participated simultaneously in the "#HelpTurkey" campaign, which was launched in response to wildfires and earthquakes in Turkey, and that these social media posts allegedly portrayed Turkey as incapable in the eyes of the international community. For this reason, it was claimed that the activities of Barım's company were outside the scope of its aims, "leaning towards acting as an agent of influence".

Schiffers states that from the very beginning of the debates, the ruling Georgian Dream Party has attempted to deflect accusations that the draft law mirrors Russia's "foreign agent law," which was enacted in 2012, by portraying it instead as a replica of the U.S. "Foreign Agents Registration Act" (FARA). In Turkey, however, the Erdoğan government justifies the "agents of influence" bill as a measure to "combat new types of espionage activities." The AKP government contends that the existing penal code's definition of "espionage" is insufficient to combat crimes that can now be carried out through different techniques.

Turkey's draft bill stipulates that "Where this act is committed during the war or jeopardised the State's preparations for war, its effectiveness in war or its military movements, the offender shall be sentenced to a penalty of imprisonment for a term of eight to twelve years."Additionally, if the crime is committed by individuals working in "institutions and organisations of strategic importance to national security," the penalty is set to be doubled."These expressions are also quite vague; it is unclear who falls under this category" says Özcan from the TBMM Justice Commission.

While other offences related to espionage and state secrets do not require prior authorization from the Ministry of Justice, prosecutors can directly initiate investigations into "agent of influence" offences, yet advancing to the trial stage necessitates ministerial approval. CHP MP Gizem Özcan claims that such an approval requirement could lead to the risk of political interference.

PEN Norway will continue to closely monitor this situation that threatens further the rights of freedom of expression, a free media and the work of NGOs in monitoring the continuing threats to the rule of law and practices of legal defence in Turkey at present.

“Every Voice That Breaks Through These Four Walls Turns Into a Resounding Echo of Freedom”

Interview with Yıldız Tar, imprisoned Editor-in-Chief of KaosGL.org

Background

Yıldız Tar, Editor-in-Chief of KaosGL.org, journalist, and human rights defender, was detained on 18 February 2025 during an Istanbul-centred operation targeting Peoples’ Democratic Congress (HDK). Tar’s home in Ankara was raided, leading to her arrest. On 21 February, Yıldız was formally arrested by Istanbul 6th Criminal Court of Peace.

The reasons for Tar’s detention include participation in peaceful protests over ten years ago and Tar’s journalistic activities. Tar’s arrest occurred amid increasing pressures on press freedom and the struggle for LGBTI+ rights in Turkey.

Responding to our questions from Silivri Prison, Yıldız Tar detailed the oppressive atmosphere in Turkey and, despite challenging prison conditions, called on everyone to remain hopeful.

As PEN Norway, we will continue to stand in solidarity with Yıldız Tar and all other detained journalists, documenting and publicising the injustices they face.

> “Post-2015 has been a period in which all state institutions have been mobilized against LGBTI+.”

Considering the present condition of LGBTI+ in Turkey, the oppression they have endured over the past ten years, and the challenges they face in everyday life, how would you describe the overall picture?

In 2015, we witnessed the beginning of a dramatic shift in the government’s LGBTI+ policies with the police attack on the Istanbul LGBTI+ Pride March. Before then, the march had been a peaceful event, drawing nearly 100,000 attendees, but the police intervention that year was not an exception. Prior to 2015, while the state refrained from enforcing protective measures and fostered an environment of hate speech and impunity, it largely avoided severe infringements on freedom of expression and association—except for sporadic legal attempts to shut down organisations. Although we cannot speak of an entirely ideal environment, it is fair to say that repression was relatively less severe. However, post-2015 has been a period in which all state institutions have been mobilized against LGBTI+.

During the State of Emergency, the indefinite ban on LGBTI+ events in Ankara not only prevented pride marches but also led to the obstruction of all events. Even though LGBTI+ associations won the lawsuits filed against this prohibitive mindset, these court decisions were unfortunately not treated as precedents and did not stop local authorities, such as governorates and district administrations, from implementing further prohibitions. On the other hand, institutions such as the Radio and Television Supreme Council (RTÜK), the Ministry of Commerce, the Ministry of Family, the Ministry of National Education, the Human Rights and Equality Institution of Turkey (TİHEK) have become the headquarters where anti-LGBTI+ political violence was disseminated through bans and hate speech. In sum, if one were to summarise the 10-year period after 2015 with a single term, it would be political violence.

The proclamation of 2025 as the Year of the Family, along with the proposed bill aiming to penalise all forms of expression related to LGBTI+ with imprisonment, is the most recent chapter in this ten-year-long process. Should the law be enacted in its current form, local authorities will no longer need to impose bans, since all activities concerning LGBTI+ will become a matter of criminal proceedings by default. This proposal, which is a copy of US President Donald Trump's "two sexes" executive order, could lead to mass detentions and arrests.

Meanwhile, hate crimes continue unabated. The cases of Hande Buse Şeker and Mira Güneş, which I have closely monitored as a journalist, stand as the most visible examples of how hate crimes unfold in Turkey. It is possible to mention tens, even hundreds of murders and attacks like these two cases. However, most of these hate attacks fail to gain any public attention at all. So to speak, even "bringing up the fact that you have been killed after being murdered" is prevented by bans.

Can you briefly talk about KaosGL.org and your Editor-in-Chief activities there?

I have been the editor-in-chief of KaosGL.org internet newspaper since 2014. Previously, I worked as a reporter, editor and a programme host in various websites, agencies and radios. Between 2009-2014, I was a volunteer for Lambda Istanbul and Istanbul LGBT+ associations. Again, from 2014 until today, I have worked as a journalist in various positions in media organisations other than KaosGL.org. KaosGL is an LGBTI+ organisation that started out as a magazine in 1994. KaosGL.org is an independent internet newspaper that publishes daily LGBTI+ news under the umbrella of Kaos GL Association. At KaosGL.org, we embrace rights-based journalism, striving to be 'the voice of the voiceless' while also working to create a platform where LGBTI+ can express themselves in addition to documenting human rights violations. As the editor-in-chief, I have been part of this journey for 11 years, working alongside our news team as well as our volunteer and contracted reporters and writers from all over the country. Against the censorship and invisibility of LGBTI+ in both mainstream and alternative media, we are working to carve out a path and tell our stories in our own language.

The draft bill on the agents of influence, the disinformation law, and other regulations affecting freedom of expression... How have all these restrictive laws impacted your work at KaosGL.org?

Even if regulations restricting freedom of expression are yet to be enacted, they create a climate of fear and lead to self-censorship. Alongside the laws on the agents of influence and disinformation, which serve to intimidate, threaten, and silence, another significant regulation—a so-called 'LGBTI+ propaganda ban'—appears to be on the way. The draft bills may change, but I believe that the government has already achieved a large part of its goal with these bills.

As KaosGL.org, we are faced with intense internet censorship in addition to these regulations. Last year our website was blocked as part of the government's "safe internet" campaign. This severely hindered our ability to reach our readers.

It should also be noted that our reporters and writers face judicial investigations and lawsuits for their news reports and articles. Almost every week, we encounter requests by a reporter or writer to use a pseudonym because of problems they face in their professional or social life. Every news and article we publish must be subjected to a risk analysis. And this has nothing to do with

the way existing legislation works. Because when it comes to LGBTI+ individuals and their rights, the law itself turns into a tool of political violence.

Could you provide us with details regarding the criminal case filed against you? What do you think was the reason for your arrest?

I have been under arrest for 20 days as of 13 March 2025, the date I answered your questions. Before that, I was under detention for 4 days. And the indictment is not ready yet. However, as far as I understand from the police and prosecutor interrogations, I am accused of "membership of a terrorist organisation". I was not asked any questions other than regarding the phone taps from 2012, when I was a student at Boğaziçi University, and 2013, when I started working as a journalist. Do I even need to state that these phone surveillances are against the law? But the phone tap recordings themselves are as ridiculous as a joke. I was asked about phone calls related to the 8 March celebration we had planned on campus during my student years, discussions concerning the activities of the LGBTI+ student organisation I was part of, and other conversations that, after 13 years, I naturally do not recall. I was asked about the time when, in 2013, I informed my editor as a reporter for a news report from the DISK building in Şişli on May 1st. The Peoples' Democratic Congress (HDK), which consists of more than a hundred entirely legal political parties, unions, associations, and foundations and has been carrying out all its activities publicly for years, is being labelled as a 'terrorist organisation". It is alleged that I "intensively took part" in their activities. The fact that while a detention order was being issued against us, HDK was holding a press statement in front of Çağlayan Courthouse was the ultimate irony of the situation.

In this process, my activities as a human rights defender and a journalist are penalised. I leave it to you to interpret how unlawfully obtained wiretaps from years ago are now being used as justification for the arrest of the editor-in-chief of an online newspaper focused on LGBTI+ rights—right at the moment when 2025 has been declared the Year of the Family.

"In this process, my activities as a human rights defender and a journalist are penalised. I leave it to you to interpret how unlawfully obtained wiretaps from years ago are now being used as justification for the arrest of the editor-in-chief of an online newspaper focused on LGBTI+ rights—right at the moment when 2025 has been declared the Year of the Family."

Can we ask about your prison conditions? Do you face any arbitrary restrictions?

Being arrested on baseless charges is itself an arbitrary restriction, but prison conditions further amplify these limitations, where access to social and physical exercise rights is obstructed in an entirely arbitrary manner. The biggest problem in the prison where we have been held for almost a month is overcrowding. As far as I remember from the prison regulations and news reports, we are 42 people held in a Type-L prison cell, which was built for 7 people. With just two toilets and two bathrooms available, ensuring adequate hygiene is naturally quite challenging. Again, access to open and indoor sports areas, which should be provided on a weekly basis, is restricted to only one or two times per month. And we are only allowed to use the closed gym. The open sports field is just a football pitch. Again, we are not allowed to participate in any of the

social activities. Apart from watching movies once a month, we are prevented from attending art, language and music courses. As far as I was informed, the justification for this is “security”. Our entire ward is also prevented from using the outdoor football field for the same reason; instead, we are only allowed out in small groups of ten for short periods. Among the most important problems is the infirmary. Our medications either never arrive or are delivered with delays. Nothing is done in the infirmary except cursory examinations. Getting a referral to a hospital is itself a tedious and exhausting process. Our parcels are delayed for a very long time. From what we’ve been able to find out, this is because the dog that is supposed to inspect them has been on a long ‘vacation’. Though we joke about it in the ward, having to wait for the duty dog’s return from its vacation just to get essentials like shoes and clothing is even more frustrating than waiting for Godot.

We observe that Pride marches face severe attacks every year, yet efforts are continually made to organize the demonstrations. How does this happen?

For a march to be considered as truly held, it must not face any bans or police intervention. However, this is not the case in Turkey. As a devoted community, LGBTI+ activists continue to come together every year despite all the violence and repression—sometimes by changing routes and locations, sometimes by dispersing across the city, and sometimes, as seen in Mersin, even by gathering at sea. However, these gatherings cannot be expanded into broad and mass marches. Because the police prevent it using violence.

I understand this situation more clearly when we meet with young LGBTI+ activists. Younger generations have yet to witness a time when Pride Marches could be held freely, resembling a great wave of celebration. Unfortunately, the phrase ‘Pride March’ now evokes images of detentions and brutality.

The year I was honoured with a special award at the Musa Anter Journalism Awards, I dedicated it to the then-imprisoned politician Sebahat Tuncel and to the Pride Marches, which continue to seek new paths despite all repression. I am still of the same opinion. In the midst of this bleak picture, we, as a society, owe our gratitude to all Pride marchers—whether they take to the streets alone or in large crowds—who boldly proclaim their existence.

Despite all periods of repression in Turkey, this ongoing resistance and the resilience of human rights defenders give us hope. But how about you, are you hopeful? What kind of Turkey do you imagine?

I am hopeful because I have witnessed firsthand how LGBTI+ rights advocates are transforming society. I have seen Kaos GL’s Anti-Homophobia Local Meetings reach over 40 cities, and in the events where I have spoken, I have observed that the perception of social equality is growing—not just in metropolitan areas but even in smaller towns. The goal of the current political violence is to build a wall between LGBTI+ individuals and the rest of society, aiming to halt the transformation toward a more equal and freer life. If we can build a solidarity strong enough to overcome that wall, we will see better days.

PEN Norway would like you to know that we stand in solidarity with you. Do you have a message for us and international rights organisations?

Thank you for your solidarity. Every voice that breaks through these four walls turns into a resounding echo of freedom.

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Conclusion & Recommendations

Since 2020, PEN Norway's Turkey Indictment Project has revealed the deep-rooted flaws in Turkey's judicial system, particularly in cases concerning freedom of expression, press freedom, and the independence of the judiciary. The findings demonstrate that the legal framework meant to protect fundamental rights is being systematically misused to silence journalists, human rights defenders, and opposition voices.

The most striking issue across the indictments examined is the lack of adherence to basic legal standards. Indictments frequently fail to establish a clear legal basis, rely on ambiguous allegations, and often include irrelevant or excessive information that obscures rather than clarifies the nature of the charges. Many cases are built on secret witness testimonies, broad interpretations of anti-terror laws, and weak evidentiary links that undermine both the right to a fair trial and the presumption of innocence.

The judiciary's loss of institutional independence has only exacerbated these concerns. The increasing executive control over the Council of Judges and Prosecutors (HSK) has made politically motivated prosecutions more prevalent, eroding public confidence in the rule of law. This has been particularly evident in high-profile cases such as those of Cengiz Çandar, Sedef Kabaş, and Ekrem İmamoğlu, where political considerations have overridden legal reasoning.

The criminalisation of journalism and legal advocacy remains a central concern. Reporters covering human rights violations, corruption, or Kurdish issues face systematic intimidation, arrests, and trials that lack procedural fairness. Similarly, lawyers defending political detainees and journalists have increasingly found themselves on trial alongside their clients, further restricting access to fair legal representation.

Despite minor legal reforms, such as the 2021 amendment to Turkey's Procedural Code (Article 170) aimed at preventing the inclusion of irrelevant evidence in indictments, these changes have failed to address the broader systemic issues. Without a commitment to genuine reform, the Turkish legal system will continue to be used as a tool for political repression rather than a mechanism for justice.

Recommendations

The findings of this report highlight deep and persistent challenges within Turkey's judicial system, particularly in cases concerning freedom of expression, fair trial rights, and the independence of legal professionals. Indictments should serve as a cornerstone of justice, ensuring transparency, legal clarity, and a fair trial process. However, the systemic issues identified—such as the misuse of anti-terror laws, the lack of prosecutorial independence, and the criminalisation of journalism and legal advocacy—demonstrate the urgent need of a strong transformation. Addressing these concerns requires not only legal and procedural changes but also a fundamental shift in the approach to freedom of speech, justice and accountability. With this in mind, PEN Norway presents the following recommendations, aimed at strengthening the rule of law, enhancing prosecutorial integrity, and ensuring that the judiciary serves its true purpose: upholding justice, not suppressing dissent.

1-Judicial Independence and the Rule of Law

The independence of the judiciary and prosecution service must be restored to ensure fair trials and prevent politically motivated indictments. The Council of Judges and Prosecutors should operate independently of the executive branch, with transparent appointment processes that prioritise legal expertise and integrity over political loyalty. Furthermore, judges and prosecutors must be protected from government interference and public pressure to rule in a particular manner.

2-Reforming Indictment Practices

The indictment process in Turkey must be overhauled to meet both domestic legal standards and international human rights obligations. Prosecutors must ensure that each indictment contains clear, specific, and well-supported allegations, directly linking the evidence to the alleged crime. The use of copy-pasted content from unrelated cases must cease, and judicial authorities should reject indictments that fail to meet basic legal requirements. Additionally, the presumption of innocence must be upheld by preventing government officials and pro-government media from making prejudicial statements about ongoing cases.

3-Freedom of Expression and Press Protection

The criminalisation of journalism must end. Articles 299 (insulting the President) and 301 (denigrating the state) of the Turkish Penal Code should be repealed or significantly amended in line with international human rights standards. Anti-terror laws (TMK) must be reformed to distinguish between legitimate journalistic activities and genuine threats to public security. Furthermore, all ongoing prosecutions against journalists, writers, and activists for peaceful expression should be immediately dismissed, and past convictions should be reviewed for potential miscarriages of justice.

4-Prosecutorial Training and Legal Education Reform

A critical step toward judicial reform is comprehensive training for prosecutors to improve the quality and fairness of indictments. Many of the flaws identified in this report stem from a lack of adherence to procedural law and best practices in indictment writing. PEN Norway's Guidelines on Indictment Writing for Prosecutors in Turkey provide a clear framework for improving the structure, content, and evidentiary basis of indictments. These guidelines should be integrated into formal legal education and ongoing professional training for prosecutors.

Additionally, the development of a standardised indictment template, aligned with both Turkey's Procedural Code and international legal principles, would help ensure consistency and legal clarity. Training programmes should also address the ethical responsibilities of prosecutors, including the importance of impartiality, respect for due process, and the avoidance of politically motivated prosecutions.

5-Fair Trial Rights and Legal Representation

The right to adequate legal representation must be protected. Lawyers should not face prosecution for defending their clients, and cases against legal professionals should be independently reviewed to prevent abuse of prosecutorial powers. The independence of bar associations must be safeguarded, ensuring they can operate without government interference. Courts must also recognise and reject indictments that rely solely on secret witness testimony, as such evidence lacks transparency and undermines the right to a fair trial.

6-Accountability and International Oversight

Turkey's judicial system must be held accountable for its violations of fundamental rights. The European Union, Council of Europe, and United Nations should continue to monitor Turkey's compliance with ECtHR rulings and apply diplomatic pressure where necessary. An independent commission should be established to review wrongful convictions related to freedom of expression cases, with reparations offered to those who have suffered legal persecution.

Final Remarks

The systematic misuse of the judiciary to silence dissent and suppress independent journalism poses a grave threat to Turkey's democratic future. The findings of this report serve as both a warning and a call to action: a judicial system that fails to uphold basic rights and freedoms cannot deliver justice.

A truly independent legal system, a free press, and an impartial judiciary are not obstacles to national security or stability. On the contrary, they are the foundations of a fair and just society. The international community must continue to support Turkey's civil society, legal professionals, and journalists who fight for these fundamental rights, while the authorities of Turkey must recognise that justice, not repression, is the key to lasting stability and prosperity.

PEN Norway remains committed to exposing judicial abuses, advocating for legal reforms, and standing in solidarity with those fighting for a fairer, more just Turkey.

Authors

Barbara Spinelli
Barbara Spinelli is a human rights lawyer from Bologna, Italy. She is European Association of Lawyers for Democracy and World Human Rights (ELDH) Co-President and she is also member of the Human Rights Commission of the Bologna Bar Council and of the Commission for Relations in the Mediterranean Area of the Italian Bar Council. She has monitored trials in Turkey over a number of years and is author of a book on feminicide and co-author of an handbook for legal international observers.

Burcu Karakaş
Burcu Karakaş is an independent investigative journalist based in Istanbul, Turkey. Her reporting focuses on human rights, migration, free speech and gender issues. Over the years, she focused on the stories of ethnic, sexual and religious minority groups in Turkey. She is an award-winning reporter, including the European Union Investigative Journalist Prize for her work on suspicious deaths of women in southeastern Turkey. She is the author of four books on minority issues and media landscape in Turkey. She was a Logan Nonfiction Fellow at the Carey Institute of Global Good in 2019.*

Ezio Menzione
Ezio Menzione specialises as a criminal lawyer, has been President of the Criminal Chamber of Pisa several times, has been a member of the Council of the Criminal Chambers and has worked in the role of defence lawyer in numerous trials of national importance. He has always been interested in minority rights, especially in terms of sexual orientation. On the subject he has published numerous articles and essays and in 1996 the book "Rights of homosexuals". He regularly participates in conferences and seminars on the subject of minorities

Florian Bohsung
Florian Bohsung is a young human rights activist and a researcher. He studied International Human Rights Law at the University of Groningen in the Netherlands. For the past year he has worked for the Legal Center Lesvos in Greece.

Gerrit Jan Pulles
Gerrit Jan Pulles is a practicing lawyer at TACT Advocaten and university lecturer at the University of Amsterdam and he is a member of the Lawyers for Lawyers. He studied international law in Amsterdam and Oxford and was a member of the board of the Amsterdam Bar. He specializes in professional legal ethics and international human rights law.

Heidi Heggdal
Heidi Heggdal is a judge at the Oslo District Court, Norway. She is a member of the Human Rights Committee at the Norwegian Judges Association. Heggdal has worked with Turkish cases for years.

Helen Duffy
Helen Duffy is a Professor of International Human Rights and Humanitarian Law at the University of Leiden and Director of Human Rights in Practice. Her research areas includes strategic human rights litigation, counter-terrorism, climate justice, human rights in armed conflict (interplay of human rights and humanitarian law), judicial independence and non-state actors.

Jørgen Watne Frydnes
Jørgen Watne Frydnes is the director of PEN Norway. Frydnes is also Chair of the Norwegian Nobel Committee who annually selects the recipients of the Nobel Peace Prize.

He has a master's degree in International Politics from University of York, UK. Frydnes has 12 years' experience from Doctors Without Borders and several years experience as Board member of the Norwegian Helsinki Committee, a human rights organization focusing on Eastern Europe and Central Asia. From 2011 to 2023 he was the CEO at Utøya, leading the work to rebuild and reclaim the island after the terrorist attack on 22 July 2011, the most traumatic event in modern Norwegian history.

Laura Vroom
Laura Vroom is completing an internship at Lawyer's for Lawyers, where she is a member of the Turkey focus group. Laura is a cum laude graduate from University College Utrecht, with a major in Law and Politics. She plans to pursue an LLM in International and European law at the University of Amsterdam next year.

Lawyers for Lawyers

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.

Şerife Ceren Uysal

Şerife Ceren Uysal is a human rights lawyer from Istanbul. An executive board member of the Progressive Lawyers Association since 2015, Ceren Uysal was awarded the Dr.Georg Lebiszczak Prize for Freedom of Speech in Austria in 2016 December. She is currently the co-secretary general of European Association of Lawyers for Democracy and World Human Rights (ELDH). Ceren is working as PEN Norway's Legal Adviser on Turkey

Tony Fisher

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.

Veya Ayra Mandapat

Veya Ayra Mandapat has completed an internship at Lawyers for Lawyers, where she focused on the PEN Norway Project. Veya holds an LLM in International and Transnational Criminal Law from the University of Amsterdam. Currently, she works in the financial technology industry where she advises clients on EU law and investigates transnational financial crimes.

List of Abbreviations

AKP:	Justice and Development Party
App. No:	Application Number
CCBE:	Council of Bars and Law Societies of Europe
CERD:	Committee on the Elimination of Racial Discrimination
CHP:	Republican People's Party
CPC:	Criminal Procedure Code
CoE:	Council of Europe
CoE Convention:	Council of Europe Convention on the Prevention of Terrorism
CoM:	Committee of Ministers (Council of Europe)
CTL:	Counter-Terrorism Law
ÇHD:	Progressive Lawyers Association
DIAYDER:	Association for Solidarity and Assistance with Religious Scholars
DİHA:	Dicle News Agency
DİSK:	Confederation of Progressive Trade Unions of Turkey
ECtHR:	European Court of Human Rights
ECHR:	European Convention on Human Rights
ELDH:	European Association of Lawyers for Democracy and World Human Rights
ETA:	Euskadi Ta Askatasuna (Basque Homeland and Liberty)
EU:	European Union
EU Directive:	EU Directive on Combatting Terrorism
FARA:	Foreign Agents Registration Act
GSM:	Global System for Mobile Communications
HDK:	Peoples' Democratic Congress
HDP:	Peoples' Democratic Party
HRDs:	Human Rights Defenders
HSK:	Council of Judges and Prosecutors
HTS:	Historical Traffic Search (used in telecom investigations)
IBB:	Istanbul Metropolitan Municipality
ICPCR:	International Covenant on Civil and Political Rights
IHRL:	International Human Rights Law
IPPNW:	International Physicians for the Prevention of Nuclear War
ISIS:	Islamic State of Iraq and Syria
JUT:	Journalists' Union of Turkey
KCK:	Kurdistan Communities Union
L4L:	Lawyers for Lawyers
MLSA:	Media and Law Studies Association
NGO:	Non-Governmental Organization
OSCP:	Office of the State Chief Prosecutor
OSCE:	Organization for Security and Co-operation in Europe
PKK:	Kurdistan Workers' Party
RSF:	Reporters Without Borders
RTÜK:	Radio and Television Supreme Council
SC:	Security Council (United Nations)
TBMM:	Grand National Assembly of Turkey
TIHV:	Human Rights Foundation of Turkey
TİHEK:	Human Rights and Equality Institution of Turkey
TMK:	Anti-Terrorism Law
TPL:	Turkish Press Law
TPC:	Turkish Penal Code
TTB:	Turkish Medical Association
TSK:	Turkish Armed Forces
UIA:	International Association of Lawyers
UN:	United Nations
YSK:	Supreme Electoral Council

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Guidelines on Indictment Writing for Prosecutors in Turkey

This Guidelines is available online and from PEN Norway in English & Turkish.

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2025