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Legal report on indictment:

Turkey v Deniz Yücel

PEN Norway's Turkey Indictment Project

Şerife Ceren Uysal

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Content

About the author

Serife Ceren Uysal is a human rights lawyer from Istanbul. During her practice in Turkey, she was working on many cases related to systemic human rights violations. She has been an executive board member of the Progressive Lawyers Association since 2012. She is also an active member of the international relations committee of the association and represents the association in several international organisations. As part of her activities at the committee, she has organized numerous fact-finding and trial observation missions together with her colleagues. Based in Vienna since December 2016, she took up the position of guest researcher at the Ludwig Boltzmann Institute for a year. She has participated in several conferences and seminars in different countries, to draw attention to the situation in Turkey, particularly in relation to lawyers and human rights defenders. She was awarded the Dr. Georg Lebiszczak-Prize for Freedom of Speech in Austria. She is currently studying at the Gender Studies Master Program of the University of Vienna during which she has been focusing on gender issues within the context of human rights law.

1: Subject of the analysis

This study constitutes a probe into the legality of the indictment running to a total of three pages compiled by Republic Deputy Chief Prosecutor Hasan Yılmaz under investigation number 2018/28713 and indictment number 2018/1395 against the suspect İlker Deniz Yücel, on 13.02.2018, within the scope of Article 170 of the Code of Criminal Procedure number 5271 and Article 6 of the European Convention on Human Rights.

2: Findings on the investigation and prosecution stages

Die Welt newspaper reporter Deniz Yücel was arrested on 14.2.2017 at Police Headquarters, where he had gone out of his own volition to give a statement on learning that there was an investigation being made against him. Yücel was detained for fourteen days, maximum periods of detention having been extended under the state of emergency law. At the end of this confinement, a prosecution statement was first taken and he was subsequently detained on 27.02.2017 following interrogation procedures conducted by Istanbul Penal Court of the Peace No. 9, before which he was brought by the prosecution, who sought his detention to be instiled.

Over the course of the process of the delivery of a prosecution statement and interrogations, Deniz Yücel was accused of the crimes of “inciting popular hatred and enmity” and “terrorist organisation propaganda.” However, from information that found its way into the press on the dates concerned, the questions addressed to him related in their entirety to articles published in Die Welt newspaper.

Similarly – on a point frequently raised in the defences by one of Yücel's lawyers, Veysel Ok – Yücel was arrested as part of the investigation commonly known as the Albayrak/Redhack investigation. However, it has emerged that he was asked absolutely no question about this matter during the compilation of either his police

statement, prosecution statement or interrogation procedures. It is known that prior to Deniz Yücel proceedings had also been launched in Turkey on six journalists who had covered the story – three of whom were detained.[1]

Deniz Yücel's detention was not merely an agenda-topping issue in Turkey, but also in Europe. Campaigns on the issue were organised by many press organisations. Featured among pronouncements made by President Erdoğan regarding Yücel's detention and the debate raging over his extradition to Germany was the statement, "It will not happen in any way. Never as long as I am in this office. We are in possession of footage, everything. This (individual) is fully a spy and a terrorist."[2] The making of statements of this kind with prosecution still pending was greeted with concern by many press organisations – particularly in terms of the principles of the presumption of innocence and independence of the judiciary.

Ten months of the one-year period Deniz Yücel spent in detention are reported to have been conducted under conditions of severe isolation. Moreover, Deniz Yücel stated in an interview he gave following his release that he underwent torture for three days.[3]

The indictment against Deniz Yücel was issued on 13.02.2018, i.e. a full year from the date on which he was arrested. Following acceptance of the indictment by Istanbul High Penal Court No 32, Deniz Yücel was released along with the court's scheduling order.

The one year it took to draft the indictment was a source of frequent criticism. Making a statement in response to the criticism, Minister Çavuşoğlu averred: "(…) However, we could encourage the judiciary to speed up the process. And we have in

[1] Veysel Ok`s defence on the merits can be accessed at the following URL: https://pressinarrest.s3.amazonaws.com/documents/deniz_yucel_avukat%C4%B1_veysel_ok_esas_savunma.pdf

[2] See: https://www.dw.com/tr/erdo%C4%9Fan-deniz-y%C3%BCcel-iade-edilmeyecek/a-38425494

[3] For details see: https://www.dw.com/tr/gazeteci-deniz-y%C3%BCcelin-savunma-metni/a-48683409

fact done this. What we are told is the situation is complex and the investigation is drawn out. Hence the process extracts a toll. This is not a personal thing."[4]

Deniz Yücel's trial was ushered in with the first hearing of 28.06.2018. Istanbul High Penal Court No 32 announcing its ruling in the nine-session trial on 16.07.2020. Although Yücel was acquitted of the offences of inciting popular hatred and enmity and making Gülenist Organisation/PDY propaganda, he was handed down a jail term for making PKK/KCK propaganda. A criminal complaint was also filed by the court against Yücel for the crimes of defamation of the President and publicly insulting the State of the Republic of Turkey.

Months prior to the passing of judgement by the local jurisdiction court, a ruling had been passed on 28/5/2019 on application number 2017/16589 to the Constitutional Court that there had been a violation of the right to personal liberty and security due to the unlawfulness of the detention and, due to detention, a violation of the freedom of expression and the press had been enacted.

3: Analysis of the indictment

3.1 Findings on the general structure and content of the indictment

a. The indictment (based on the electronic format) consists of around three pages. The imputed offences are seen to be the conducting of successive terrorist organisation propaganda (twice) and incitement of popular hatred and enmity. The nature of the evidence given in the indictment, the non-hearing of witnesses during the investigation and the absence from the indictment of the original and translated content of the cited written content ascertained to be Yücel's, as well as the mere three pages to which the ensuing indictment comprise, raise question marks as to why the indictment could not have been drafted sooner than within

[4] See: https://www.dw.com/tr/%C3%A7avu%C5%9Fo%C4%9Flundan-deniz-y%C3%BCcel-a%C3%A7%C4%B1klamas%C4%B1/a-41988228

one year. **Even if combined consideration is given to nothing but the extent of the indictment, as testified to by the number of its pages and the time Yücel underwent prosecution under detention, a practice is seemingly evident that is contrary to the principle that detention has been used as a measure and the right to personal liberty and security has thereby been violated.**

b. On the first page of the indictment, after having made the political assessments that the terrorist organisations active in Turkey had common aims and that each one of them served the goal of dividing the State of the Republic of Turkey, it is stated that there are court rulings where in which all the organisations listed successively in the indictment are terrorist organisations. Subsequently, such expressions are employed as if they were "in collaboration" or "virtually in collaboration" and it was summarily concluded that these organisations were in unity in terms of aims. **As such, absolutely no connection is seen to have been established between the suspect and the charges laid against the suspect through the written content of the first page of the indictment.**

c. It was stated at the end of this first page that the investigation into Deniz Yücel had been severed from the investigation being conducted jointly into the other suspects, yet no further mention was made of this point within the indictment. It is also public knowledge that prior to severance the matter under investigation in which Yücel was included and that also basically constituted grounds for arrest was the procurement by Redhack through the hacking of emails relating to Berat Albayraktar.[5] The indictment makes no reference to this matter. Furthermore, absolutely no connection was made in the overall content of the indictment between this first investigation and the charges contained in the indictment.

d. The second page moved on to the allegations against Deniz Yücel. Having stated that a portion of Yücel's articles written in German had been translated into Turkish as part of the investigation, the entire page is devoted to a **summary of**

[5] For details see: https://tr.sputniknews.com/columnists/201703011027446120-die-welt-muhabiri-deniz-yucel-redhack/

the content of Deniz Yücel's articles or reports having seven different dates and with one undated.

Two points merit mention in this regard.

First, absolutely no information is provided in the indictment as to the translation procedure. Moreover, neither the translated articles nor the translations of the articles are included in the indictment. **It is consequently impossible to determine the faithfulness of the translations to the original texts from within the indictment**. It was frequently averred during the trial that mistakes sufficient to corrupt the meaning were made in the translations in question.[6]

As to the second important point, this relates to the dates, subject matter and nature of the reports qualified in the indictment as being basic evidence. The following are from this section of the indictment:

> - There is reference to an article penned by Yücel **dated 19.06.2016**. No section of the article is included. It is indicated that statements emanating from various people who are PKK/KCK members are contained within the article and comments having the nature of praise were made with reference to top-level echelons of the organisation in question by means of such expressions devoted to these people as “a high-ranking PKK commander-in-chief.” It emerged in the course of the trial that there had been a translation error in this regard. No link was made between the cited report and organisation propaganda or the crime of inciting popular hatred and enmity. For, as is known, the use of a qualifying adjective on its own does not constitute the offence of organisation propaganda, nor does such usage fall within the scope of the offence of praising crime and criminals under the Turkish Criminal Code. Consequently, no causal link appears to have been established between this report and the charges in question.

[6] For details see: https://artigercek.com/haberler/deniz-yucel-hakkindaki-suclamalara-yanit-verdi

- It was subsequently stated that administrative and military measures taken by Turkey were portrayed in Yücel's article (or articles since this is unfathomable from this portion of the indictment) as the destruction of graves and it was thereby wished to portray the operations the state was waging against the said organisation as unlawful. It is incomprehensible from the linguistic structure of the indictment, whether reference is made through the comments here to a single article or more than one article, or whether these comments pertain to the said article dated 19.06.2016 or an article from another date. It is not apparent here, either, which crime the act imputed to Deniz Yücel is subsumed under because it appears not only that the content summarised here has not been linked to the charges, but that this content or, put differently, act does not involve the material elements of either offence on which the indictment is founded. **It is also known that nowhere within Turkish Criminal Code legislation is there a crime defined as portraying any operation the state conducts as being unlawful. The principle of legality in crime and punishment is a universal principle of penal law and this lends itself to the conclusion that the content of the section in question of the indictment is not thereby legally compliant.**

- A further report to which reference is made **dated 18.07.2016** is declared in the content of the indictment apparently showing that Yücel spoke in the article in question confidentially about who was responsible for the coup attempt staged on 15.07.2016. The indictment alleges that Yücel engaged in Gülenist Organisation/PYD propaganda by penning this article. However, **even if it is apparent from sample sentences forming part of the content of the article that Yücel made various observations regarding the coup attempt, no reference was made in the indictment to his having penned a positive sentence about the coup attempt or a force and violence-inciting pronouncement of his.**

- Yet another report **dated from 24.07.2016**, alleges that Tücel, by using the expression “ethnic cleansing” with reference to operations conducted against the PKK/KCK by Turkey, conducted propaganda on behalf of the said organisation. **However, even if the expression “ethnic cleansing” was used in inverted commas, the sentence and the context in which it was used does not appear in the indictment. Even if this expression can be assumed to have been treated as such, in inverted commas, it does not involve the material elements of the crime expressly provided for under Article 7/2 of the Anti-Terrorism Law. No palpable explanation was given as to how the suspect’s intent was to showcase a resort to violence, force or threat, as imputed from the expression “ethnic cleansing” and how the act was construed as such by the prosecution.**

- Subsequently, references were made to an article by Yücel **dated from 06.11.2016**. Initial mention was made here of a photograph used as the background to the article upon publication. It was then stated that in the content of this article, Yücel made pronouncements from within the Gülenist Organisation/PDY's discourse and ideology and thereby made the conducted the said organisation’s propaganda with the intention of creating the impression that the PKK/KCK organisation was a political structure by publishing the interview he made with the individual named Cemil Bayık, and it was opined that the offence of conducting propaganda was thereby committed. **The analysis made by the prosecution in this section once more speaks to it having violated the principle of legality in crime and punishment and, concurrently, not subjecting favourable evidence to analysis because there exists no crime stipulated in either the Turkish Criminal Code or Anti-Terrorism Law regarding the classification of any organisation – even if recognised as a terrorist organisation in a judicial system – as a political structure. At the same time, when even the prosecution indicated in the indictment that an interview had been made with the said individual named Cemil Bayık, the failure to determine that**

this act had been carried out under the aegis of journalism as a profession puts the objectivity of the indictment into question.

- Moving on, reference was made to an article by Yücel **dated from 12.12.2016**. In this, it was stated that in this particular article Yücel once more committed the crime of conducting PKK/KCK propaganda through coverage of the death of Hacer Aslan, who lost his life in Cizre. Here yet again no reference was made by the prosecution to any pronouncement whatsoever on the part of the suspect in the content of this report or article that amounted to inciting violence, force and threat.

- It was then stated that Yücel related a joke about Kurds and Turks in an article of his **dated 26.10.2016** and part of the joke was included in the indictment. However, the context and positioning within the text as a whole of this wording cannot be ascertained since the entire article was once more not included in the indictment. Given the absence of the introductory, discussion and concluding sections of the article in which the joke in question was included, it is impossible to make a self-styled analysis by passing on a joke.

- Finally, making reference to an article by Yücel **dated 27.10.2016**, he stands accused of committing the crime of inciting popular hatred and enmity with the phrase “genocide committed against the Armenians” by way of concluding remarks:

- Reference was apparently made to seven different dated articles emanating entirely from 2016 and reference was made to the content of a report of the indeterminate date.

- Even though it is evident from the content of the indictment that Deniz Yücel is known to be a journalist, no explanation appears as to the reasons whereby the reports, articles or interviews in question are not construed as falling under press freedom. **This state of affairs creates the impression**

that evidence favourable to the suspect was not taken into account and, additionally, that from among the commentary on which the indictment was founded, purely that unfavourable interpretations were selected and used.

- At this point, there is another issue that merits special mention. The provision in Clause 1 of Article 26 headed "Prescriptive Periods" of the Press Law is known to take the following form:

> "Penal proceedings in respect of offences committed by means of printed works or otherwise specified in this Law must by way of procedural requirement be brought up within four months in the case of daily publications and six months in the case of other printed works".

The articles, interviews or reports which are listed above and form virtually the sole foundation of the indictment emanate in their entirety from 2016 and on both the date of the indictment of 13.02.2018 and the date upon which Yücel was detained, the cited prescriptive period had expired in respect of the entirety of these acts. Even if debate rages in the literature over the simultaneous publication on the internet of similar content, what is certain is that two different prescriptive periods cannot be run in respect of the same and single act. The moment content is published on a website, the act is committed and the pertinent prescriptive period will start to run. Furthermore, it is also manifest that, if the same content is printed, the periods in Article 26 of the Press Law must be invoked in such cases. Consequently, by virtue of procedural law, the drafting of the indictment against Deniz Yücel is devoid of legal foundation by virtue of time limitation from its very outset.

- With the exception of the text of one joke and two sentences questioning who was responsible for the coup attempt, absolutely no citations are made from the content of these reports numbering eight in total and phrases alone were transported into the indictment. **The impression is**

created in such as way that words were cherry picked given the absence of the original texts or the translations of these texts from the indictment.

The Constitutional Court ruling issued in 2014 in this respect points to a fundamental source with reference to indictment drafting processes. It is expressly stipulated in the relevant Constitutional Court case law that a text, provided as it does not, by leaving out certain sections but adding the preface "***examined as a whole***, that*: "praising violence or inciting and encouraging people to adopt terrorist methods or, put differently, the resort to violence and hatred, extraction of revenge or armed resistance,"* is to be construed as freedom of expression.[7] Moreover, the Constitutional Court has decreed the penalisation of the comments: "**What the nation states that share Kurdistan are waging is a war of genocide**,"[8] "As opposed to the peoples of other parts of the world, having endured **all manner of physical and cultural genocide**, the existence, history and right to exist of the Kurds has been denied,"[9] and "regardless of whether the assaults take the form of **assimilation, denial and cultural and physical genocide** or are through violent means or ideologically political institutions, the society that undergoes assault will defend its innate rights, that is, the fundamental rights that give rise to its existence and organise itself on this axis of defence,"[10] constitutes a violation of freedom of expression.

There is a compelling expectation for indictments to be drafted in accordance with these criteria since the prosecution also has a duty to protect basic rights and freedoms; however, in addition to this, there can

[7] Constitutional Court, Fatih Taş Application, Application Number: 2013/1461, Ruling Date: 12/11/2014, § 106; Mehmet Ali Aydınlar Application, Application Number: 2013/9343, Ruling Date: 4/6/2015, § 82.

[8] Constitutional Court, Abdullah Öcalan application, Application Number: 2013/409, Ruling Date: 25/6/2014

[9] Constitutional Court, İbrahim Bilmez application, Application Number: 2013/434, Ruling Date: 26/2/2015

[10]Constitutional Court, BejderRoAmed application, Application Number: 2013/7363, Ruling Date: 16/04/2015

be no expectation for the load on the judiciary to lighten wherever the texts of indictments fail to dwell on the material elements of crimes.

- As has been stated above, it must be noted that linguistic considerations come to the fore under circumstances in which all charges are based on articles, reports and interviews the suspect are written in German. Silence over the translation procedure and oversight of the translation procedure speaks further to an absence in terms of the indictment.

- **Finally, the prescriptive period notwithstanding, the date of 2016 carried by all the reports also exposes a huge contradiction relating to the indictment because the crime date has been specified in the indictment to be 2017.**

e. On the heels of the reports, it was stated that the HTSs and call records were counted among the evidence against Yücel and that within these records were calls made with 59 people with police records. **However, the people in question were not listed in the indictment, nor was any commentary included as to the content of these calls. Even though the suspect was known to be a journalist, it is not discernible from the text of the indictment if checks were carried out as to whether the calls in question were made as part of professional activity. Nor can it be discerned from the indictment whether a comparison was made between the call record dates and the dates of the interviews or articles contained in newspapers.**
f. In the final section of the indictment, it having been stated that Yücel's articles were analysed in conjunction with the records in question, the determination was made that the suspect wrote articles informed by the discourse and ideologies of the Gülenist Organisation/PDY and PKK/KCK organisations. Moreover, his trial was sought for the crimes of conducting terrorist organisation propaganda and inciting popular hatred and enmity.
g. The content of the indictment additionally passes over Deniz Yücel's statement at the Police Headquarters, his statement at the prosecution and his defence before

the interrogating bench. **The absence from the indictment of the evidence the suspect adduced at the investigation stage (if any), or even his defence casts doubt as to whether the statements and evidence in question were subject to examination at all**.

h. Given the absence of any intermediary headings in the indictment, one cannot speak of the existence of a distinct section in which the prosecution examines the evidence relating to the suspect. In summary, the following comments were included by the prosecution to serve as a conclusion:

> *"With it ascertained from the content of the evidence gathered that the suspect İlker Deniz Yücel successively committed the offences of propagandising for the PKK/KCK armed terrorist organisation and the FETÖ/PDY armed terrorist organisation and ,similarly, that the offences of publicly inciting one segment of a certain part of public to hatred and enmity, … for the indictment drafted against the suspect İlker Deniz Yücel to be accepted and for him to be tried and sentenced for his actions pursuant to the cited relevant statute."*

3.2: Examination of the indictment within the scope of Article 170 of the Turkish code of criminal procedure:

Article 170 of the Code of Criminal Procedure No. 5271 headed "Bringing Publicly Prosecuted Proceedings," contains basic provisions on the requirements for and components of indictments. The assessment in this respect will initially be conducted as to whether the indictment against Yücel's alleged crimes meets these components.

a. Pursuant to Article 170 of the Code of Criminal Procedure, every indictment must include particulars of the suspect's identity and counsel. This particular indictment conforms with the said formal requirement.

b. It is also a requirement of Article 170 of the Code of Criminal Procedure for the identity of murdered persons, victims or those harmed by the crime, that the attorney or legal representative of victims or those harmed by the crime, the identity of the person who made the report if there is no objection to their being revealed, the identity of the person who made the complaint and the date the complaint was made to find inclusion in the indictment. Upon examination, it should show the charges to be the conducting of popular hatred and enmity and making of terrorist organisation propaganda and the imputed crime is not one subject to complaint and that it is evident from the content of the indictment that the investigation was also conducted in the name of the public. At the same time, there is mention of a report record among the evidence, but the identity of the person who made the report and the content of the report, which require being specified in accordance with this particular article, are not contained in the indictment. Had it been deemed objectional for the person who made the report to be revealed, this point obviously needed to be set out in the indictment. However, no comment or discussion is made in the indictment on this point, either.

c. Pursuant to Article 170 of the Code of Criminal Procedure, the charges laid against the suspect and the statutory articles whose application is warranted must be expressly laid down within the indictment. Mention is seen to be made within the indictment in question that the imputed crimes are inciting popular hatred and enmity and constitute a form of terrorist organisation propaganda. An examination of the relevant statutory articles reveals that the relevant statute and imputed crimes have been cited consistently with reference made to 216/1 of the Turkish Criminal Code in connection with the crime of inciting popular hatred and enmity and reference made to Article 7/2 of the Anti-Terrorism Law in connection with making terrorist organisation propaganda and the indictment appears to display absolutely no deficiency in this regard.

d. As per the provision of Article 170 of the Code of Criminal Procedure, in indictments as a whole the date, place and time frame of the commission of the imputed crime must find inclusion within the indictment. It is seen in the indictment being scrutinised that the crime date is stipulated to have occurred in 2017, while the place of the crime is stipulated to have been Istanbul. This situation renders the charges in the indictment abstract and calls its foundations into question.

- In the first place, the evidence listed by the prosecution consists in its entirety of articles penned in Germany, but these articles are not included by way of evidence in the file. Then, a second important point is that these articles appear from the indictment to date in their entirety from before 2017. Not a single report dated 2017 features in the indictment.

- Reference is made once to 2017 in the entire content of the indictment. The prosecution has specified that the HTS and call records were dated as having occurred between the dates of 2014 and 2017. However, the elements of both imputed crimes preclude them from being committed in the course of phone calls. This means that, while the crime date in the indictment is 2017, a reference has not been made to a single act of the suspect dating from 2017.

The offence of terrorist organisation propaganda is a typified crime. To lay the charge of propagandising specification must absolutely be made as to the date and place of the commission of the crime and the means used. As such, if the crime date specified in the indictment is deemed to relate to the crime of propagandising – since this clearly means that the suspect can only be tried for an act he committed on the specified date in a trial brought under this indictment – none of the reports contained in the file should be prosecutable.

The specification of an entire year such as 2017 with respect to the crime of inciting popular hatred by itself contradicts one of the most basic elements of this crime. For, according to article 216/1 of the Turkish Criminal Code regulating the

offence in question, there must be clear and proximate danger for the offence to be constituted. Determination is hereby required of a danger that evokes the expression “clear and proximate.” Furthermore, at the same time, this danger needs to be certain to cause damage, and do so imminently, if no precaution is taken. Just as no act is specified in the indictment apart from writing articles and phone calls, the specified acts have been determined as to not to fall within the scope of this article. Even if there was a threat that fell within the said scope in 2017, the indictment is also silent on this.

The specification of an entire year by way of crime date and the way the entirety of the evidence upon which the charges are deemed to rest as per the final paragraph relates not to this year but to other years obfuscates the accusations made against the suspect in the context of the entire indictment. There is a high likelihood of this situation giving rise to a violation of the right of defence.

e. A further component sought in indictments under Article 170/3 of the Code of Criminal Procedure is for the evidence of the crime to be expressly set out in the indictment. The following documents are seen to be listed in the evidence section of the indictment being scrutinised:

- Report record

The making of a reference to a report within an indictment may not affect the substance of the indictment. However, knowing the identity of the maker of the report constitutes a part of the right of defence. The express provision in this regard has been contravened.

- Search-Seizure and Arrest Order Records

The absence of the content of these documents points to another deficiency relating to this case due to its failure to cite these documents given it also excludes from the indictment the circumstances under which Yücel was subjected to arrest procedures

and subsequently detained, i.e. the information that he went to the police of his own volition to give a statement. It is also manifested that, under circumstances in which it was determined that no crime elements were detected in the seizure and search documents, this consideration constitutes favourable evidence. No finding to this effect is contained in the indictment, either.

- Expert reports [No expert report is referred to in the indictment.]

- HTS Records [Reference is made to such records in the indictment.]

Reference was made to such records in the indictment and the number of people having police records was also specified. However, it is impossible to access any information at all from the indictment as to the frequency and content of calls. Particularly, bearing in mind that the suspect is a journalist, the failure to specify which of the content of these calls was professionally related begs the question as to whether favourable evidence was identified.

- The suspect’s defence and interrogation records

Not a single word in this regard is included in the indictment. This means that it is indiscernible from the indictment as to whether the prosecution took account of the suspect’s defence and the evidence he adduced or requested be gathered.

- Other evidence:

The other evidence listed in this section consists fully of documents relating to the suspect’s identification particulars along with a number of records and writs; a portion of these documents [e.g. writs] amount to paperwork involved in judicial procedure.

In conclusion, even if the evidence appears to have been listed in a formal sense, the newspaper articles and interviews underpinning the entire indictment do not find inclusion within the evidence. It may well be considered that these documents be encapsulated by the expression “the entire contents of the file,” but the purpose of the provision of Article 170/3 of the Code of Criminal Procedure is to ensure not just that the evidence is set out individually, but that its content is articulated with sufficient clarity to enable the suspect to understand and conduct his/her defence. In such terms, neither the initial suspicion and evidence supporting the suspicion that gave rise to the launching of the investigation nor the newspaper articles and reports along with the translations of the reports in question that appear from the entirety of the indictment to have been presented in the indictment as other fundamental prosecution evidence apart from the phone records were listed among the evidence. Additionally, there is a portion of the evidence whose very content cannot be ascertained. Consequently, even if the evidence appears in formal terms to have been listed, the requirements for specifying evidence of Article 170/3 of the Code of Criminal Procedure appear not to have been fulfilled.

f. Article 170/3 of the Code of Criminal Procedure also contains a requirement for inclusion within the indictment of as to whether the suspect was detained and, if so, the arrest and detention dates and their duration must be added. The indictment being scrutinised contains the relevant documents.

g. Article 170/4 of the Code of Criminal Procedure lays down one of the most fundamentally important provisions governing indictments. As per the said provision, an indictment must set out the events constituting the imputed crime such that they are linked with the available evidence. No examination or assessment satisfying the requirement of this provision was seen to be made in the content of the indictment being scrutinised.

   In the section in which the articles are summarised one by one along with their dates, the prosecution essentially appears to have adopted a method of drafting the indictment along the lines of “terrorist propaganda was determined to have

been made in the content of the article XX, dated XX, by means of the wording XX." However, pronouncing any act by a person to constitute a crime does not amount to establishing the connection of causality required by statute. The statute is looking not for criticism of the crime in deed but for evidentiary support of the link between the deed and the crime. The current indictment subjects the suspect's articles that constitute part of his professional activities to interpretation and criticizes them as the crime.

Naturally enough, each indictment calls for both a different degree of attention and requires various kinds of details to satisfy this requirement. However, it can be argued that there are certain minimum criteria in this regard. For example, there are known to be three fundamental elements in connection with the offence of conducting terrorist organisation propaganda and these three elements must be integrated in their entirety with the offence. The first is for the act to serve as propaganda and the second for the subject matter to deal with a terrorist organisation. As to the third, and most important, this refers to the terrorist propaganda to constitute a nature that may incite methods of force, violence or threats. Even if within the indictment, the prosecution has qualified certain statements as propaganda relating to a specific organisation, no comment or justification has been made as to how these statements constitute an incitement to force, violence or threats.

As to the material object of the offence of inciting popular hatred and enmity, this consists of various segments of the populace who exhibit different traits in terms of social class, race, religion, sect or region, and who are made the butt of incitement and exposed to incitement. However, along with this, in the content of the article, a definition is provided whereby incitement posing a clear and proximate danger to public safety is a necessary condition for the constitution of the offence. In such terms, this does not mean that the content of the articles the suspect penned and the phrases he selected in the process on their own invite adequate suspicion of this offence having been committed. The prosecution must establish the facts that the act of writing in question posed such a clear and

proximate danger and that there was a high likelihood of harm occurring if measures are not taken. It is not apparent from this particular indictment as to which statement by the suspect caused a clear and proximate danger of this kind because a charge on this count is laid within the indictment despite no contention that a danger of such kind arose.

According to the justification text for the amendment made to Article 174 of the Code of Criminal Procedure number 5271, the legislator's aim is for the evidence informing the conclusion reached in the indictment to be discernible and for sufficient suspicion of guilt to be adduced without fail rather than an abstract allegation. It is received wisdom that the "prosecution must lay concrete charges against the suspect and suspects. This is a natural consequence of the indictment being the document that launches the proceedings".[11] In view of this, the indictment being scrutinised has visibly failed to substantiate the offence and satisfy the requirements of Article 170/4 of the Code of Criminal Procedure.

h. Express provision is made within the ambit of Article 170/5 of the Code of Criminal Procedure whereby not only matters to the detriment of the suspect, but also matters favourable to him/her must be put forward in the concluding section of the indictment. Newspaper reports or articles bearing his signature constitutes the entirety of the evidence against the suspect. Although the prosecution has not included information in the indictment about the publication, issue, etc. in which the articles in question were published, it can be unarguably ascertained from the indictment in its entirety that the suspect is a journalist. As such, if acts such as the composition of articles and conducting of interviews, which are a necessary component of the suspect's profession, are deemed and adduced to be culpable acts and if not a single other act has been asserted in connection with the imputed charges, then it is evident that consideration must absolutely be given to the suspect's profession. Here, the suspect's profession indisputably amounts to

[11] Özkan Gültekin, The Indictment and Return of the Indictment in the Doctrine and Practice, Seçkin Publishing House, 2011, p.99

favourable evidence. The non-inclusion of this point in the indictment places the legality of the indictment in question within the context of Article 170/5 of the Code of Criminal Procedure.

i. Inspection of the provision of Article 170/6 of the Code of Criminal Procedure reveals that the requirement has been imposed for the sentence sought from among the penalties and security measures sanctioned in the relevant statute for the crime committed to be set out expressly in the concluding section of the indictment. The indictment being scrutinised also contains deficiencies in this regard. The prosecution calls for punishment in general terms but does not specify the penalties that may be envisaged for the imputed crimes and, likewise, with reference to security measures directly cites the general provision without fleshing out which security measure or measures are required. As such, the indictment in question has been determined to fall far short of satisfying the requirements of Article 170/6 of the Code of Criminal Procedure.

j. Finally, the second paragraph of Article 170 of the Code of Criminal Procedure warrants consideration with reference to all the above discussion. The provision in question mandates the existence of "sufficient suspicion" for the bringing of publicly prosecuted proceedings. It has been stated that this provision "has emphasised the relationship between suspicion of crime and the notion of evidence, and the commission of a crime must be supported with evidence." Indeed, "if, according to the evidence at hand, the suspect is more likely to be convicted than acquitted in the prospective trial, sufficient suspicion can be spoken of".[12] However, it has been seen in the indictment in question that, in connection with organisational propaganda, selected statements were merely included without contextual examination, and the most fundamental element of the offence, the force, violence and threat element, was not supported with evidence, either. As to the offence of inciting popular hatred and enmity, in reiteration of what has been stated above, the existence of a clear and proximate

[12] Nur Centel/Hamide Zafer, Criminal Procedural Law, Beta Publishing House, 2008, p.441

danger has not been posited in this respect. The upshot of this is that the existence of sufficient suspicion cannot be said to have been expressed in this particular indictment, either.

3.3. Examination of the indictment within the context of international law

Examination of the indictment in question within the context of international law must be conducted with reference to the principle of fair trial as regulated in Article 6 of the European Convention on Human Rights (ECHR) and the United Nations Guidelines on the Role of Prosecutors.

a. Examination of the provision of Article 6/1 of the European Convention on Human Rights clearly reveals that the holding of individuals' trials within a reasonable time is subsumed within the right to a fair trial[13]. As such, the drafting of the indictment following the passage of one year from İlker Deniz Yücel's detention and, moreover, the mere two and a half pages to which the text ran, and the holding of the first hearing sixteen months after the arrest date creates the impression that the right to a fair trial in the sense given in Article 6/1 of the ECHR was violated from the very outset.

b. Article 6/3 of the ECHR specifies the minimum rights of those charged with a crime. Everyone in this situation must 'be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him.' As mentioned in the above item, the one year the current indictment took to be drafted means that Yücel had no knowledge of the concrete charges for that whole period. This situation at the same time poses the risk of a violation under Article 5/3 of the ECHR because a reasonable time cannot be said to have been given.

[13] Article 6/1 [first sentence] of the European Convention on Human Rights: 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.

Additionally, for reasons discussed in detail in the section in which the indictment was analysed in the context of Article 170 of the Code of Criminal Procedure, such as both the failure for the offences to be linked to concrete events and for a connection to be established in this sense between acts whose place and time were specified and the evidence, and for penalties that may be envisaged by way of statutory sanctions for the charges to be stipulated in the concluding section of the indictment, as well as for the content of certain of the documents listed in the evidence section to find coherent inclusion in the text of the indictment, it is inconceivable that Yücel could have reached a detailed understanding of the scope and nature of the charges against him. While the language of the indictment is a language the suspect speaks and understands, the failure of the content to satisfy the statutorily stipulated requirements raises the prospect of a possible violation of 6/3.1 of the ECHR.

c. The content of the articles, reports and interviews which apparently form the basic foundation of the indictment merits attention in a separate item in relation to the practice of the European Court of Human Rights (ECtHR). In particular, the manner the cited content in question finds inclusion in the indictment may give rise to a fundamental breach of the law because no opportunity is furnished for the overall context of any of the articles to be ascertained. There is no possibility of checking the content apart from the phrases selected from the texts by the prosecution. ECtHR case law in this respect offers significant clarity. For example, in the Ceylan/Turkey ruling, the ECtHR deemed penalisation for such statements as, “We must oppose murder and state terror and achieve unity using all the strength of organisation and cooperation” to be a freedom of speech violation. It ruled that Turkey had violated freedom of speech in that the writer’s article, which “despite its virulence, does not encourage the use of violence or armed resistance or insurrection.”[14] In another of its judgments in a dispute condemning the harsh tone of a press statement in which the state was accused of engaging in “burning villages,” “murder and extrajudicial killings” and “arbitrary arrests,” it stressed that

[14] ECtHR, Ceylan/Turkey, 23556/94, 08 July 1999.

the signatories of the press statement had brought the events to attention for the public good and found the statement in question neither to have encouraged popular violence and insurrection nor to have targeted the military, ruling that, on the contrary, that the duty of alerting the public to concrete events had been fulfilled and that penalization constituted a violation of basic rights.[15] Once more stressing that the applicant, who criticised government policy in the province of Tunceli by using phrases such words as, “war machine,” “burning villages,” “genocide,” “murder,” “torture,” “duress” and “fire of retribution,” had called for the waging of “peace and freedom campaigns,” the ECtHR concluded that the penalisation of these expressions was in violation of the freedom of speech.[16] In yet another judgement, it found expressions the applicant had used such as “the war in Turkey's south-east” or “the state’s murder” posed no threat to national security, territorial integrity and public safety and concluded there had been a violation of the freedom of speech.[17]

d. It was also established that, along with Yücel's right to freedom during his unjust detention, his right to the presumption of innocence had been violated by means of press statements made by various political authorities including the President while the trial was pending and, to conclude from all the analyses in this report that the prosecution may have abused its power of discretion with ill-intent and a clear aim of suppressing free expression and that the indictment was based on an interpretation that extended beyond the concrete facts. Given that no reasonable justification was specified for any of the crimes imputed to Yücel, it must be considered highly likely that Article 18 of the ECHR was violated.

e. Another matter which must in turn be addressed concerns the contention in the indictment that propaganda was made concurrently for two organisations, namely the PKK/KCK and Gülenist Organisation/PDY, yet in the realm of political

[15] ECtHR, Karakoç ve diğerleri/ Turkey, 27692/95 28138/95 28498/95, 15 October 2002.
[16] ECtHR, Mehmet Hatip Dicle/Turkey, 9858/04, 15 October 2003.
[17] ECtHR, Karkın v. Turkey, 43928/98, 23 September 2003.

science these cannot be conflated in terms of ideology and discourse. Even if the prosecution endeavours to justify this position by pronouncing there to be a concrete unity of aims involving both organisations, it fails to draw a link between the suspect and this abstract pronouncement. The contention that the suspect successively made propaganda concurrently for two organisations that cannot be conflated in ideological terms must absolutely be accounted for within a basic logical chain. Otherwise, the indictment will remain within the bounds of abstract conceptualisation and the making of contentions of this kind in the absence of reasons is suggestive of disregard of the matter of sufficient suspicion, which is a precondition for the drafting of an indictment.

f. Finally, there is a need to examine holistically the United Nations Guidelines on the Role of Prosecutors. The provisions from Article 10 to Article 20 in the said guidelines delineating the role of prosecutors in criminal proceedings are of special importance. According to the said Guidelines, prosecutors "shall perform an active role in criminal proceedings, including institution of prosecution and, where authorized by law or consistent with local practice, in the investigation of crime, supervision over the legality of these investigations."[18] It will be noted that supervision over the legality of investigations has been stipulated to be the prosecuting office's judicial role and duty. As such, the indictment prosecutor must be considered directly responsible for the legality of an indictment and the legality of the evidence cited in the indictment.

g. It is stated in Article 12 of the same Guidelines that "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." As has been stressed frequently in this report, the passage of one year between the suspect's detention and the date on which the indictment was compiled speaks to an inability to meet the expectation for the

[18] ECtHR. Ecer and Zeyrek / Turkey, Application no: 29295/95 and 29363/95, paras. 32-37, 27.02.2001

prosecution to act expeditiously. When it comes to contributing to ensuring due process and the smooth functioning of the criminal justice system, what is to be expected of a prosecutor at the investigation stage is for them to be alert to the legality of evidence, attend to the matter of sufficient suspicion and give consideration to favourable evidence. The deficiencies detected in these regards have been listed in the section analysing the indictment within the scope of the Code of Criminal Procedure.

h. Reference is also made in Article 18 of the Guidelines regarding the need for prosecutors to discontinue investigations where charges are unfounded. Satisfaction of this provision once more requires sufficient suspicion linking the act and perpetrator and this being supported with evidence. The deficiencies detected in this respect have also been listed in the section analysing the indictment within the scope of the Code of Criminal Procedure.

4: Conclusion

As has been expounded on in detail above, the indictment being scrutinised contains virtually none of the attributes that it is required to possess under either domestic legal regulations or international legislation. Especially when consideration is given to the prescriptive period provision, this indictment should never have been drafted.

Organization under intermediary headings is virtually absent from the indictment. There is no reliance on concrete evidence, especially with regard to the charges laid against the suspect. Reference is simply made to phrases from newspaper reports and articles by the suspect and not only has the requisite contextual and holistic examination not been made, but a practice has been followed that lends itself to inculpatory interpretation through cherry picking. By referring to two organisations which are contradictory in ideological terms throughout this process, the basic logical consistency required in the indictment was also found lacking.

Similarly, with reference to the charge of inciting popular hatred and enmity, absolutely no effort appears to have been expended by the prosecution to demonstrate the existence of a clear and proximate danger.

Lack of organisation under intermediary headings leaves those who examine and read the indictment scrambling to find the evidence and acts. A quality indictment is an indictment that clearly lays out the acts and evidence within, links them to one another and at the same time carries logical consistency.

However, in a manner that brings into question of its quality in all the sections stated above, the indictment's biggest deficiency as it stands is the absence of any illegal actions. Which statutory articles the suspect stands charged under are discernible from the indictment, but it cannot be ascertained as to which acts apart from those required by the nature of journalistic activities (such as conducting interviews or writing articles) have given rise to these charges. The source of the sufficient suspicion that leads to journalistic activities being qualified as organisational propaganda also defies comprehension. Clarity is known to have been attained in recent years as to implementation of Article 7/2 of the Anti-Terrorism Law and there must also be a call to actions such as force and violence for propaganda activity to be constituted. The suspect's acts are neither specified, nor has any finding been detected in the indictment whereby the suspect called for force and violence.

Examination of this indictment has unearthed various points that must be dwelled on under all circumstances to facilitate the surmounting of similar problems in practice and in this sense the surmounting of similar problems in investigations, which are of crucial importance in terms of accessing justice. As has also been noted in previous reports, it should initially be made mandatory for prosecutors to satisfy the requirements of Article 170 of the Code of Criminal Procedure and, to act as an incentive in this regard, indictments should be integrated into a compulsory format in each case like the Constitutional Court individual application forms. Secondly, first-instance court judges should for their part absolutely be encouraged to return indictments. The mechanism of returning indictments will both reduce the judicial

load and will serve a supervisory function with a view to prosecuting offices issuing indictments in a higher quality and more meticulous manner. A further point that absolutely warrants mention in connection with this indictment is the responsibility incumbent on the executive to avoid infringement of the principle of the presumption of innocence. Comments on the merits made by people who are permanent fixtures in the executive while a case’s investigation and prosecution stages are pending augment the impression that the progress of the indictment, or in other words of judicial activity, is under the influence of the executive.