

**P E N
N O R W A Y**

Legal report on indictment:

Turkey v Pelin Ünker

*Evaluation of the indictment in the criminal case against journalist
Pelin Ünker issued by Istanbul Public Prosecution Office of
Investigation for Press Crimes the 22 February 2018.*

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For PEN Norway's Turkey Indictment Project

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Turkey Indictment Project by PEN Norway

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Caroline Stockford, PEN Norway's Turkey Adviser, leads the project. Aşkın Duru is the Turkish coordinator for the project.

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About the author of the report on 'Turkey v Pelin Üner':

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1: Introduction

This evaluation report is drafted as a part of the Turkey Indictment Project, established by Norwegian Pen. It represents an analysis of one of the indictments against Pelin Ünker.

2: Summary of the case

Pelin Ünker is a Turkish journalist and a member of the International Consortium of Investigative Journalists (ICIJ). She joined the Cumhuriyet newspaper in late 2000s and never worked for any other newspaper upon the criminal investigation against her.

The German newspaper Süddeutsche Zeitung, obtained in 2016 a set of 13.4 million confidential electronic documents relating to offshore investments. The documents are widely known as "Paradise Papers". Süddeutsche Zeitung called in the ICIJ to oversee the investigation.

Cumhuriyet published the first of Ünker's articles based on the Paradise Papers in November 2017. The article revealed that the sons of Binali Yıldırım were listed in the papers. Binali Yildirim was Turkey's Prime Minister from 2016 to 2018. The sons, both doing maritime business, officially set up two companies in Malta.

Ünker wrote another article showing that the government had awarded a \$7 million contract to a company listed at the same Istanbul address as Erkan Yildirim's Maltese company Nova Warrior. That company happened to belong to a good family friend to the Yildirims.

After the articles, Binali Yıldırım and his two sons sued the journalist and one of her colleagues along with the newspaper for allegedly violating their personality rights, arguing that Ünker had created "a false image" in public.

Berat Albayrak and Serhat Albayrak also sued Ünker for defamation, together with Ahmet Çalık. Berat Albayrak is Turkey's finance and treasury minister and President Erdogan's son-in-law. Additionally Çalık Holding (a holding company closely tied to Erdogan and Berat Albayrak and mentioned in the articles) sued Ünker claiming for damages.

By the beginning of 2018, Ünker had two civil suits for damages and three prosecutions under the criminal law against her, all connected to her Paradise Paper – articles.

The criminal cases where Ünker was charged with insulting a public officer (Binali Yıldırım) and defamation (Bülent Yıldırım and Erkan Yıldırım) got merged. On 8 January 2019 Ünker was sentenced to 13 ½ months prison for insulting Binali Yildirim and to a fine of 8 660 TL in the defamation case.

On 19 March 2019, the court of appeal decided to cancel the prison sentence. The reason for this was that the charge was not filed within the first four months after the related article, which is a requirement according to Turkish press law. However, the court decided no irregularity existed concerning the defamation case, and confirmed the fine, reducing the amount to 7080 TL.

The third criminal case is the prosecution for defamation of Berat and Serhat Albayrak and Ahmet Çalık. This report evaluate the indictment regarding this case. The first proceeding was supposed to take place on 21 June 2018, but was postponed to 22 November 2018 due to the judge's absence. On 22 November 2018, the defense lawyer requested the merger of this case with the others. The court decided to examine the cases and postponed the proceeding to 21 February 2019.

On the third proceeding on 21 February 2019 the defense lawyer requested an acquittal due to undue filing of the case. On the last hearing on 28 March 2019, the court decided to dismiss the case due to Statute of limitation in the Turkish press law.

Ünker left her job in Cumhuriyet newspaper in the aftermath of her reporting on Paradise Papers.

3: The indictment

The indictment accuses journalist Pelin Ünker of "Defamation via Press". Turkish Criminal Code (CC) Article 267/1 and Article 53 are cited as the relevant articles. The document is about three pages long. The first page consists of formalities. These formalities, such as the place, date and time period of the alleged crime, the date that the claims have been put forward, the evidence of the offence etc., are very significant for the criminal procedure and need a closer examination.

The next two pages have a description of the complainants petition, Ünkers defence, a short description of the procedural decisions made in the case, a description of the

crime and the conclusion to start a criminal case. In contrast to many other indictments in freedom of speech cases in Turkey, this indictment is quite short. However, short is not equivalent to well-structured and comprehensible. The indictment is poorly written and does not meet the basic purpose of an indictment, namely to give the defendant an understanding of the accusation, the legal basis and the relevant evidence that support the accusation.

4: Analysis

4.1 Evaluation of the indictment in terms of Turkish Laws

The Turkish Criminal Procedure Code (CPC) Article 170 regulates the duty of the public prosecutor and the required content of the indictment:

Article 170

1. The duty to file a public prosecution rests with the public prosecutor.
2. In cases where, at the end of the investigation phase, collected evidence constitute sufficient suspicion that a crime has been committed, then the public prosecutor shall prepare.
3. The indictment, addressed to the court that has subject matter jurisdiction and venue, shall contain:
 - a. The identity of the suspect,
 - b. His defence counsel,
 - c. Identity of the murdered person, victim or the injured party,
 - d. The representative or legal representative of the victim or the injured party,
 - e. In cases, where there is no danger of disclosure, the identity of the informant,
 - f. The identity of the claimant,
 - g. The date that the claim had been put forward,
 - h. The crime charged and the related Articles of applicable Criminal Code,
 - i. Place, date and the time period of the charged crime,
 - j. Evidence of the offence,
 - k. Explanation of whether the suspect is in detention or not, and if he is arrested with a warrant, the date he was taken into custody and the date of his arrest with a warrant, and their duration.
4. The events that comprise the charged crime shall be explained in the indictment in accordance to their relationship to the present evidence.

5. The conclusion section of the indictment shall include not only the issues that are unfavourable to the suspect, but also issues in his favour.
6. At the conclusion section of the indictment, the following issues shall be clearly stated: which punishment and measure of security as foreseen by the related Law is being requested to be inflicted at the end of the adjudication; in cases where the crime has been committed within the activities of a legal entity, the measure of security to be imposed upon that legal entity.

4.1.1 Article 170/3 - Formalities

The indictment conforms to the requirements in Article 170/3 in respect of most of the formalities. In the introductory section (page 1) it clearly sets out the identity of the suspect, the defence lawyers name, the complainants name and their legal councils.

There is no mention in the indictment whether the suspect has been in detention or not. As the defendant was not in detention, the lack of information on this matter is not important to the overall evaluation of the indictment.

The crime charged, described as "Defamation via Press" and the related articles applicable (the Turkish Criminal Code (CC) Article 267/1 and Article 53) is set out in the introductory section. However, the indictment does not describe the various elements of an offence under CC Article 267/1, or why it is applicable. This is a serious defect, both according to Turkish law and to international fair trial standards.

A very important requirement in CPC Article 170 is the "evidence of the offence (170/3-j). The list of evidence in the indictment is presented as follows:

Original copies of Cumhuriyet newspaper dated 06-11/11/2017, plaintiff petitions, suspect's defense, the ruling against prosecution, Istanbul 7th Court of Peace Judgship dated 15/02/2018 sundry business no. 2018/771 removal of ruling of no further prosecution, ruling of no further prosecution, criminal record, civil registry and the entire file scope

The list of evidence does not fulfill its purpose. It is the duty of the prosecutor to connect the evidence to the alleged crime. If there is any part of the articles that can be considered a crime according to CC Article 270, these parts must be cited accurately and in whole in the indictment. The lack of this information is a serious violation of CPC Article 170 and leaves the defendant in total ignorance of both her alleged crime and the evidence that is supposed to support the allegation. As shown below, this is also a violation of international standards for fair trial.

4.1.2 Article 170/4 – Description of the alleged crime and the evidence establishing the offence

The offence under CC Article 267/1 consist of four elements:

- accusation of another person of committing an unlawful act
- the accusation is made in order to secure the implementation of an administrative sanction or the commencement of an investigation and prosecution
- the accusation is made through the press or broadcasting
- the accusation is made despite the fact that the accuser knew the person did not commit such an act

All four elements must be present. It is also a condition that the criminal act is committed intentionally.

The Indictments descriptive part describes the alleged crime as follows:

As per Turkish Criminal Law Article 267, it is outlined that actions of an illegal accusatory nature lodged through the media, which may prompt an investigation despite prior knowledge that the action was not committed constitutes a crime, in the case at hand, the defendant who authored the series of articles published in the Cumhuriyet newspaper and website under the title "Off-Shore Brothers" referencing the source Paradise Papers, wrote that using off-shore accounts was not legitimate, that corruption and money laundering needed to be prevented, that in order to ensure tax justice and prevent global inequality the tax laws needed to be reviewed; that tax laws were being evaded by defrauding corporate tax and taking advantage of attractive tax breaks offered for companies established in other countries and thereby the defendant wrote about actions to steer the public into accusing the plaintiffs of these actions. Contrary to the articles, the plaintiffs owned companies that were established transparently and managed in compliance with national laws and were not included in the off-shore accounts. In conclusion, the lodging of behavior that could be characterized as tax avoidance, tax evasion or money laundering exceeded the limits of freedom of the press and it is apparent from the evidence shown above and the entire scope of the file that reasonable doubt

has been established for the accused crime to have take place, therefore a public case has been filed in response to the aforementioned finalized court ruling.

Even taken into consideration that some of the content and structure is lost in translation, the indictment is utterly unreadable and incomprehensible. The sentences are very long. In-between all these words it is hard to find the alleged crime. However, it seems that Üner's alleged crime is that she

- wrote that using off-shore accounts was not legitimate
- had an opinion on the consequences of the practice of establishing companies in countries with attractive tax breaks
- by writing her opinion on these consequences steered the public into accusing the plaintiffs of these actions
- The accusation of behavior that could be characterized as tax avoidance, tax evasion or money laundering exceeds the limits of freedom of press
- The evidence shows that there was reasonable doubt about the crime the claimants were accused of.

As mentioned above there is no attempt in the indictment to connect the allegations to the wording in the articles. Üner stated in her defence (a defence that is referred in the indictment):

that not only was there was no accusation being directed in association with the commercial activities being carried out and that the honor and reputation of those involved was not being questioned, that no violation of any law lodged against the plaintiffs occurred when the case is examined, that the necessary questions were presented to the concerned parties some time before the articles were written and the answers to these were also included in the articles

Again, the language is unnecessary complicated and hard to read, but there is no doubt about the meaning. Üner explained that she did not accuse the claimants of illegal activities, nor did she question the honor of the claimants, the claimants got to comment on the article before it was published and the comments from the claimants were included in the article.

The indictment does not argue against Ünkers defense, it simply ignores her arguments. The lack of referral to the parts of Ünker's articles where she allegedly accuses the claimants of illegal activity is striking and clearly indicates that there is no such accusation to be found in the articles. Consequently, the prosecutor has also failed to show that Ünker intentionally aimed to convince the authorities to start a criminal or administrative investigation against the claimants.

It is the prosecutor's duty to determine and justify the concrete connection between the elements of the crime, the evidence and the act. In addition to point out the objective elements, the prosecutor must prove that Ünker intentionally committed the criminal act regulated in Article 267/1. The indictment define the possible accusations against the claimants, but not whether it was Ünkers intention to accuse them. Without this intention, according to the law, Ünker cannot be accused. Eventual intention (*dolus eventualis*) is not sufficient for conviction.

The prosecutor has failed his duty in this indictment. The indictment does not fulfill the requirements according to CPC Article 170/4. Consequently, Ünker is left in total ignorance of the connection between the evidence (the articles) and the alleged crime. This makes it impossible to prepare a defence.

4.1.3 Article 170/5 Does the indictment include not only the issues that are unfavourable to the suspect, but also issues in her favour?

As mentioned above the indictment included some of Ünker's defence. In fact, about one third of the descriptive part of the indictment is reserved for Ünker's defence.

One could say that the referral to Ünkers defense will raise the judges' awareness concerning issues that are favorable to Ünker. It could also give an incentive to read the articles (that are included as evidence) and thus notice that Ünker did not accuse the complaints of committing crimes.

However, the fact is there is no shred of evidence in Ünker's favour in the indictment. This is not in line with the mandatory requirements in CPC Article 170/5. The main issue in favour of Ünker is the fact that she did not accuse the claimants of criminal

activities. Regardless of this fact, the indictment states that she wrote that using an off-shore account was not legitimate.

4.1.4 Article 170/2 – Should the prosecutor prosecute?

According to Article 170/2 it is the prosecutor's duty to determine whether the collected evidence constitutes *sufficient* suspicion that a crime had been committed. A plain suspicion of a crime committed is not enough. The prosecutor must do the exercise of controlling if there is evidence supporting both the objective and subjective element of the criminal act described in the law. If there is not enough evidence to support sufficient suspicion, the prosecutor must decide on non-prosecution.

The Office of the Chief Prosecutor made a decision of non-prosecution upon the investigation of the case on 3 January 2018. Originally, it seems like the prosecutor found there was not sufficient evidence to support that a crime had been committed and then followed the requirements in the law not to prosecute. The claimants objected to the non-prosecution decision and Istanbul 7th Criminal Court of Peace decided on 15 February 2018 to prosecute upon the claimants' objection.

As the analysis above shows there was not any evidence in the indictment that supports sufficient suspicion of a crime committed. It is a possibility that the prosecutor found it difficult to issue an indictment for actions that the prosecution office initially decided not to prosecute. This could, so some extent, explain the defective indictment. However, the prosecutor must follow the law and perform his duty according to Article 170/2. It is clear that the decision to prosecute was political and not based on the facts and the evidence of the case.

The conclusion is that the indictment does not meet the requirements set out in CPC Article 170. The main defects are the complicated and incomprehensive language and the lack of connection between the evidence and the alleged crime.

4.2 Evaluation of the indictment in terms of international standards

Normally, when an indictment is not in line with domestic criminal procedure law, it also violates international standards on criminal procedure. This indictment is no exception.

According to the Constitution of the Republic of Turkey Article 90, ratified international law is taking precedence over national law. Turkey has ratified the European Convention of Human Rights (ECHR). Turkish citizens are therefore directly protected, through the Constitution, by the fair trial standards enshrined in ECHR Article 6 and the freedom of speech in ECHR Article 10.

Other relevant international standards can be found in "United Nations Guidelines on the Principles Concerning the Role of Prosecutors" and the standards set out by the International Association of Prosecutors on the principle of fair trial regulated under EHRC.

4.2.1 ECHR Article 6 § 3

According to ECHR Article 6 § 3 a) enshrines the defendant the right to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him.

The European Court of Human Rights (ECtHR) has published a "Guide on Article 6 of the European Convention on Human Rights"¹ and this Guide points out 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.

¹ https://www.echr.coe.int/Documents/Guide_Art_6_criminal_ENG.pdf

Even if the indictment is written in Üner's mother tongue, the indictment is very difficult to understand. It is hard to read and incomprehensible due to long and complicated sentences. It is almost difficult to decipher the accurate content.

Furthermore, the indictment fails in connecting what exactly Üner wrote in her articles that violates CC Article 267/1.

The incomprehensible language and the failure to connect the alleged crime to the evidence, leave the defendant in ignorance about where the crime is in her articles. The preparation for her defense is almost impossible.

4.2.2 ECHR Article 6 § 2, Presumption of innocence

The way the indictment is set up seems to violate the presumption of innocence enshrined in ECHR Article 6 § 2. As mentioned above, the indictment fails to consider the fact that Üner did not write in her articles that establishment of off-shore companies is illegal according to Turkish law. The indictment simply states that Üner accused the claimants of illegal activity and that the content of her articles exceeded the limits of the free press, without any further evaluation. Üner is presumed guilty, even if a closer examination of the evidence would have shown that she did not commit any criminal act.

Üner's right according to ECHR Article 6 to a fair trial is clearly violated.

4.2.3 ECHR Article 10, Freedom of speech

Even if Turkey is one of the worst countries in the world when it comes to imprisoned journalists, the freedom of press is clearly stated in Article 28 in the Constitution.

The constitution 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

ECtHR made a guide on the interpretation of the Conventions Article 10 and the following is outlined in this guideline:

According to the Court, "freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders." In this context:

the limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance (§42).²

News articles about the content of the so-called "Paradise Papers" were published all over the world. Pelin Ünker was the only journalist who faced criminal charges.³ Freedom of expression constitutes one of the essential foundations of a democratic society. It was within Ünkers job as an investigative journalist to write these articles and it is clear that her rights according to ECHR Article 10 was violated. The indictment fails to show any part of the articles that are false or of any accusatory art. The reference to the limits of freedom of press in the indictment does not have

² [https://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-18\(2007\).pdf](https://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-18(2007).pdf)

³ <https://www.icij.org/investigations/paradise-papers/turkish-journalist-sentenced-to-prison-over-paradise-papers-investigation/>

any evaluation of Ünker's rights as a citizen and as a journalist to report news and give her opinion on the consequences of tax havens.

4.2.4 United Nations Guidelines on the Principles Concerning the Role of Prosecutors⁴

The Article 10 to 20 in the Guidelines 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.

As mentioned above it seems like the prosecutor initially did act in accordance to both Turkish criminal procedure legislation and international standards, as the first decision on the claimants demand was a decision of non-prosecution.

After Istanbul 7th Criminal Court of Peace decided on prosecution and the prosecution office issued an indictment, the process had not been in line with the basic standards for prosecutors set out in the UN guidelines. It is clear that the indictment is not a fair balanced document that ensures a due criminal process. As mentioned above several times, the indictment is unreadable, incomprehensible, unbalanced 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 Ünker is that the subjects of her article were politicians in power in Turkey and close relatives of these

⁴ <https://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfProsecutors.aspx>

politicians. As mentioned above ECtHR stated in the *Lingens* judgment that the press have the task of imparting information and ideas on political issues just as on those in other areas of public interest. Clearly, the indictment is not impartial, but is in fact a result of political discrimination.

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 prosecution of Üner was a violation of the public interest in being informed about political issues. Furthermore, it was not by any means objective and it did not pay attention to circumstances that were favourable to Üner. As frequently mentioned above, the most obvious flaw of this indictment is the lack of connection between the alleged crime and the accurate content of the articles.

The International Association of Prosecutors, which was established in 1995, has issued a set of standards to ensure "fair, effective, impartial and efficient prosecution of criminal offences" in all justice systems.⁵ 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." The fact that the prosecutor in Istanbul initially decided on non-prosecution in a highly political case like this one, clearly shows that there was nothing to prosecute.

⁵ [https://www.iap-association.org/getattachment/Resources-Dokumentation/IAP-Standards-\(1\)/IAP_Standards_Oktober-2018_FINAL_20180210.pdf.aspx](https://www.iap-association.org/getattachment/Resources-Dokumentation/IAP-Standards-(1)/IAP_Standards_Oktober-2018_FINAL_20180210.pdf.aspx)

5: Conclusion and Recommendations

The indictment against Üner lacks any legal base. It's a document constructed to look like it fulfills the formal requirements set out in Turkish law and that there is sufficient suspicion of a crime committed. It does not take much analysis to detect that the crime does not exist. The most likely purpose of this indictment is to censor the press and intimidate Üner.

The first recommendation is to keep the content of the indictments in a simpler and more readable language. Prosecutors in many countries, Norway included, write indictments in a complicated and unfamiliar language. However, the indictment against Üner is extraordinary.

The next recommendation is simply to follow CPC Article 170 down to the last letter. If that is done, the indictment will give the defendant the necessary information.

In this particular indictment, it is crucial to connect the evidence to the alleged crime. Each element of the alleged crime must be supported by evidence. Furthermore, the indictment must show the evidence that is in favour of Üner.

The indictment should also discuss if the articles exceed the limit of the freedom of the press.

At last, the prosecutor should evaluate if the indictment is in line with ECHR rights, especially the right to be presumed innocent.

If the prosecutor followed these recommendations he would find that the first decision of non-prosecution was correct.

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