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Legal report on indictment:

Büyükada trial

PEN Norway's Turkey Indictment Project

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Content

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1: Background

This legal report is an analysis of the “Büyükada indictment”, issued on 4 October 2017 (Indictment No 2017/4842), concerning the prosecution of the eleven human rights activists Ali Gharavi (Swedish national), Günal Kurşun, İlknur Üstün, Muhammed Şeyhmus Özbekli, Nalan Erkem, Nejat Taştan, Özlem Dalkıran, Peter Frank Steudtner (German national), Veli Acu, as well as Amnesty International Turkey Director Idil Eser and Amnesty International Turkey Chair Taner Kılıç. All defendants, including the two foreign workshop trainers, have been charged with crimes related to being suspected of affiliations with terrorist organisations. The case centres about the arrest of the so called “Istanbul 10”, following a human rights workshop about dealing with stress as an activist as well as about protection of digital information. The workshop was held on the Turkish island Büyükada, off Istanbul in July 2017. On the third day of the workshop ten defendants were arrested. Taner Kılıç was later added to the indictment by the prosecutor, because he was suspected of having been aware of the preparations for the workshop, even though he was not physically present on the island, since he had already spent one month in prison at that time, on grounds of “membership of the Fethullah Gülen Terrorist Organisation” following another on-going investigation.

2: Investigation Phase and Pre-Trial Detention

2.1. Access to a Lawyer

When the police arrested the ten defendants in Büyükada on 5 July 2017, they were denied access to their lawyers for more than 24 hours. Nobody was informed of their exact whereabouts, and only the day after it was revealed where they were held.[1]

Immediate access to a lawyer from the moment there is a criminal charge is an essential characteristic of the right to a fair trial and is guaranteed in Art. 6(3)(c) of the European Convention on Human Rights (ECHR) and Art. 14(3)(b) of the International Covenant on Civil and Political Rights (ICCPR).

As the European Court of Human Rights put it: "Prompt access to a lawyer constitutes an important counterweight to the vulnerability of suspects in police custody, provides a fundamental safeguard against coercion and ill-treatment of suspects by the police, and contributes to the prevention of miscarriages of justice and the fulfilment of the aims of Article 6, notably equality of arms between the investigating or prosecuting authorities and the accused."[2]

Even under national law the right to access a lawyer cannot be restricted for more than 24 hours as it is enshrined in Art. 154(2) Turkish Criminal Procedure Code.

By denying the defendants access to their lawyers, an important procedural right has been disregarded, which resulted in an unfair disadvantage for the defendants arising from their exploitable vulnerability. International as well as national law was violated.

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[1] Amnesty International https://www.amnestyusa.org/press-releases/absurd-terrorism-investigation-launched-into-amnesty-internationals-turkey-director-and-nine-others/ (accessed 6 November 2020)
[2] Simeonovi v. Bulgaria, ECtHR no. 21980/04 (12 May 2017) para. 112

2.2. Adverse Media Campaign

As has been reported by Amnesty International[3] and Human Rights Watch[4], from the moment of their arrest, the defendants were subjected to an adverse media campaign, suggesting links with numerous outlawed organisations and alleged plans to divide the Republic by anti-government protests. The claims were based on pieces of information, which only people involved in the investigation had access to. Therefore, it is believed that details about what had been found and heard during the raid in Büyükada were intentionally given to the media.

Prejudicial attention like this is likely to have direct impact on the general fairness of a trial. Not only could it violate the principle of presumption of innocence as it is enshrined in Art. 6(2) ECHR and Art. 14(3) ICCPR but could also affect the impartiality of the court required by Art. 6(1) ECHR and Art. 14(1) ICCPR.

For its assessment whether such a media campaign impacts the fairness of a trial, the European Court of Human Rights evaluates different factors. One of those factors being whether "the impugned publications were attributable to, or informed by, the authorities."[5]

Therefore, if the defendants can prove the involvement of the authority in leaking information, the fair trial principle could be violated. Public opinion must be free from unlawful influence by public officials.

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[3] Amnesty International https://www.amnesty.org/download/Documents/EUR4473292017ENGLISH.pdf (accessed 6 November 2020)

[4] Human Rights Watch https://www.hrw.org/news/2020/07/06/turkey-politically-motivated-conviction-activists (accessed 6 November 2020)

[5] Beggs v. the United Kingdom, ECtHR no. 15499/10 (16 October 2012) para. 124

2.3. Detention

As mentioned above, ten defendants were arrested in the morning of 5 July 2017. They were separated and moved to different police stations. Only on 17 July 2017 they were interrogated by the public prosecutor – after twelve days of detention without charges. The same day the prosecutor requested pre-trial detention for all ten of the defendants on the grounds of "strength of the evidence, seriousness of the crime, need to protect evidence from interference and risk of flight".[6] Subsequently the judge ordered pre-trial detention for six of them (Ali Gharavi, Günal Kurşun, İdil Eser, Özlem Dalkıran, Peter Frank Steudtner, Veli Acu) with the arrest warrants dating 17 July 2017. Upon appeal of the prosecutor the judge on 23 July 2017 issued further arrest warrants for İlknur Üstün and Nalan Erkem, sending them back into custody. Only Muhammed Şeyhmus Özbekli and Nejat Taştan remained on bail but were kept under judicial restrictions.

The right to liberty is a principle protected not only by international law but also Turkish law. Art. 5 ECHR, Art. 9 ICCPR and Art. 19 of the Turkish Constitution all provide protection from arbitrary detention. Especially prompt judicial review of police detention serves as a guarantee to avert unjustified interference with individual liberty and protects from abuse of power by state authority.

With the requirement of promptness, a strict time constraint has been constituted which leaves no room for interpretation. As the European Court of Human Rights noted in its ruling on *Oral and Atabay v. Turkey,* any period between the arrest of the accused and the time before he or she is brought before a judge exceeding four days

[6] Amnesty International https://www.amnesty.org/download/Documents/EUR4473292017ENGLISH.pdf (accessed 6 November 2020)

is prima facie too long.[7] Similarly, the Human Rights Committee found that a period of four days without justification was in violation of Art. 9 ICCPR.[8]

In light of this, keeping the ten defendants in detention for twelve days before presenting them to a judge was contrary to international standards. The procedural guarantee of having prompt access to a judge in order to challenge the legality of the detention was violated, leading to the deprivation of liberty in an arbitrary way.

The eight defendants, who remained in detention were finally released on bail on 25 October 2017 after having spent 113 days in prison. Taner Kılıç, who was arrested by the police one month prior to the Büyükada workshop on 6 June 2017, was released on 15 August 2018 after 432 days in prison.

Under Art. 5(3) ECHR the authorities are being given two choices: either bringing an accused to trial within reasonable time or allowing provisional release pending trial. Therefore, keeping defendants in pre-trial detention must be justified and is generally only acceptable if the public interest outweighs individual rights, for example on the grounds of "danger of absconding, the risk of pressure being brought to bear on witnesses or of evidence being tampered with, the risk of collusion, the risk of reoffending, the risk of causing public disorder and the need to protect the detainee".[9] The burden of proof lies with the authorities.

Even if some of those reasons were brought forward to keep the defendants in pre-trial detention, the time the defendants, especially Taner Kılıç, spent in prison seems to be excessive. Alternative measures like release on bail or guarantee for appearance should have been considered. Art. 9(3) ICCPR specifically states that people awaiting trial in custody shall be the exception rather than the rule.

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[7] Oral and Atabay v. Turkey, ECtHR no. 39686/02 (23 June 2009) para. 43
[8] Michael Freemantle v. Jamaica, Human Rights Committee no. 625/1995 (24 March 2000) para. 7.4
[9] Buzadji v. The Republic of Moldova, ECtHR no. 23755/07 (5 July 2016) para. 88

2.4. Sufficient Suspicion

The investigation phase usually ends with assessing the evidence. According to Art. 170(2) Turkish Criminal Procedure Code it lies within the prosecutor's responsibility to determine whether enough evidence has been collected to constitute sufficient suspicion that a crime has been committed. Only then, the prosecutor shall proceed.

On 4 October 2017 the prosecutor issued the indictment accusing the eleven defendants of "membership of a terrorist organisation", additionally to accusing ten defendants (except Taner Kılıç) of "aiding armed terrorist organisations". The fact that it took him three months to produce the indictment indicates difficulties to uncover reasonable evidence to support the allegations.

As will be analysed in detail in the following chapters, the prosecutor failed to produce any evidence of criminal wronging and even worse based his allegations on unverified and fabricated evidence.

3: Structure and Format

The indictment (Turkish version) consists of 17 pages. The first four pages contain information about the defendants, listing all eleven in alphabetical order with additional information about their lawyers and date of detention/date of judicial control decision. The list is followed by an overview of information in relation to the alleged offence, which is structured clearly.

The main part under the heading "Investigation documents were examined" seems to be divided in different parts:

- introductory paragraph
- general allegations against each individual
- allegations against four individuals in relation to bank transactions
- paragraph about seizure of mobile phones

- concluding paragraphs

These different sections are not separated by headlines, which makes it hard to get an easy overview of the indictment.

The prosecutor starts with an introductory paragraph about the alleged offence in relation to two witness statements, followed by a list of organisations which the defendants supposedly stand in connection with. By using phrases like “operating against the constitutional order of the country”, “aim to establish a theocratic state based on their distorted understanding of sharia by threatening, debilitating and diverting state authority by using force, violence and other unlawful methods”, “overthrowing the Republic of Turkey” or “people’s armed uprising” the prosecutor, at the beginning of the indictment, already establishes a tone, which manages to stir up fear.

The first paragraph is followed by different sections that seem to be divided in relation to each individual. Again, there are no headlines to mark the beginning of a new section. Some defendants are mentioned multiple times, which makes it even harder to understand the indictment’s structure. Whatsapp chats, meeting notes and other documents are excessively cited in between sections. Some parts are highlighted in bold and with underlining, indicating particular importance for the prosecution.

The prosecutor continues with citing exact money transfers in relation to the bank accounts of Günal Kurşun, Özlem Dalkıran, Veli Acu, Nejat Taştan and concludes the indictment in the same manner he started it: by appealing to emotion with phrases like – “social chaos”, “threatening public order with acts of violence”, “targeting the Constitutional Order and public peace”.

The format of the indictment in general, as well as the presentation of important facts and details is not satisfying. Particularly headlines would be necessary to clearly set out a structure and consequently make it easier to understand the indictment’s content faster.

An indictment plays a crucial role for a fair and transparent criminal process, because as from the moment of its service the defendants are formally given notice about the allegations against them. Therefore, producing a well-structured indictment which is clear in its allegations should be of high priority for the prosecutor.

4: Analysis in terms of Turkish Law

We analysed and evaluated this indictment on the basis of Art. 170 of the Criminal Procedure Code of the Republic of Turkey regarding the duty of filing a public prosecution.

4.1. General Assessment, 170(3) Criminal Procedure Code

The indictment does correctly include the basic requirements like identity of the suspects, their defence counsels, date of detention and date of judicial control decision.

However, when it comes to the charged crime and the related articles of the applicable Criminal Code, there are some inconsistencies. Listed as “Offence” is “membership of an armed terrorist organization, aiding armed terrorist organizations.”. But in the section “Related Article” there are not only the relevant Articles for membership cited (“Turkish Penal Code Articles 314/2, 53/1 and 58/9 on the basis of Anti Terror Law No 3713 Article 3 and 5”), but also “Turkish Penal Code 220/6”, which relates to the crime of committing an offence on behalf of an armed terrorist organisation. The relevant article for aiding such an organisation (Turkish Penal Code 220/7) is completely missing, even though it is mentioned as offence.

An indictment’s section of “Offence“ and “Related Article” should always be consistent. In this case both offences of Art. 220(6) as well as Art. 314(2) carry maximum sentences of 15 years. Art. 314(2) (membership offence) however, is much more serious and sentences upon conviction are on average up to seven years imprisonment, while those under Art. 220(6) are oftentimes half that. For this reason,

it is of utmost importance, that the prosecution is clear on which exact offences the defendants are being charged for.

Furthermore, it is not clear why Taner Kılıç was added to the indictment. Fact is, that at the time the Büyükada workshop took place, he was already in prison, having been detained one month earlier after an unrelated investigation. The Prosecutor accuses Taner of having been aware of the preparations for the Büyükada workshop and having been in communication with some of the other defendants in the Büyükada case, thereby linking Taner to the Büyükada case and justifying his inclusion in the indictment. Since many of the defendants are members of Amnesty International and therefore colleagues of Taner, it is not unusual for them to be in contact with one another. Additionally, this line of argumentation fails to explain how his mere "awareness" of the preparations of a workshop incriminates him or links him to the cases of the others.

4.2. Evidence, 170(4) Criminal Procedure Code

Our analysis and evaluation of this indictment show high concerns in regards to the presentation of evidence, more precisely in linking the evidence to the charged crimes. In order to not go beyond the scope of this report, we will not be able to analyse in detail every single evidence listed in the indictment. We will however give a general overview of the points that sparked our concern and connect them to a few specific examples.

4.2.1. A Human Rights Workshop

The whole indictment is built around a supposedly secret workshop on the island Büyükada. Factual circumstances, however, do not support the claim of the workshop being secret at all. On the contrary, having been organised by a network of human rights organisations in Turkey, this meeting was generally known about within the human rights community, as well as widely covered in pro-government media.

Fact is furthermore, that the event was held in a public hotel, and the actual workshop took place in a glass structured room next to other public areas of the hotel. The participants were therefore clearly visible and through the open door of the seminar room anyone could overhear their discussions.

These outlined factual conditions surrounding the workshop clearly indicate, that it was anything but secret. To the reader of the indictment, this brings up the question why the event is repeatedly referred to as “secret” throughout the indictment? Could the purpose be to make this workshop sound more incriminating to begin with? Since the whole indictment is based around the organisation of this workshop, it seems like there has been a certain pressure to carve out circumstances, that constitute sufficient suspicion for the prosecutor to have grounds for preparing an indictment at all. This impression ties into another phrasing we found within the indictment, which is used to describe events like this workshop as *“organized meetings and activities in order to generate movements that would give rise to social chaos“*. The particular circumstances of this workshop, as outlined above, do objectively not create the impression of an underground secret meeting with the sole purpose of organising social chaos.

4.2.2. Incriminating Communications

It was highly noticeable, that many of the defendants were suspected of having committed a crime solely because of so called “communications” with someone who was at the time of the indictment suspected to have connections to a terrorist organisation. However, there was no actual incriminating content in any of these “communications”, or at least it was not made clear what kind of accusations are being made in these regards.

To give an example, one of these conversations is simply about a mutual friend visiting and needing a place to stay. The reader of the indictment is left puzzled as to why a conversation like that is included in the indictment. The mutual friend is, as also mentioned in the indictment, an LGBT activist. But no claims have been made,

that there is anything illegal or incriminating about them. It is unclear what the prosecutor is trying to suggest by including this conversation, unless he wants to impose a general suspicion against valuable members of the queer community. If that was the case, it would certainly raise concerns of the utmost severity against this prosecutor on multiple grounds of violating any understanding of discrimination and human decency.

Regarding another defendant, the prosecutor mentions that there are “records available documenting her telephone conversation” with someone who was arrested in an unrelated operation. The actual content of the telephone conversation is not mentioned, as it apparently did not include any incriminating content. Similar to the other example mentioned above, it is once again unclear, why this conversation is even listed in the indictment as evidence against the defendant or more precisely what the defendant is accused of in this context.

To include conversations like that in the indictment’s list of evidence, seems to be used as basis for the theory, that the defendants can somehow be connected to people who might or might not have been involved in any illegal activities. Listing these conversations, citing seemingly random content or not mentioning their content at all, does once again give the impression, that the indictment tries to fabricate any connection imaginable, or much rather wants to suggest guilt by association. Having been in contact with someone who at some point has been arrested in unrelated incidents, is certainly too far stretched to be used as evidence against any of the defendants. Suggesting guilt by association of course also stands directly in conflict with the presumption of innocence as stipulated by Art. 6(2) ECHR.

In its “Report on the impact of the state of emergency on human rights in Turkey”, the Office of the United Nations High Commissioner for Human Rights (OHCHR) observed “a pattern of application of punitive measures not prescribed by the Penal Code that have targeted not just the primary ‘suspects’ (such as civil servants or human rights activists) but also people associated with them”. The OHCHR goes on to explain: “This raises concerns that the Government may be applying the illegal

standard of guilt by association or collective guilt, which violates principles of individual legal responsibility, fairness and legal certainty."[10] This statement is in line with the Council of Europe's Commissioner for Human Rights, who voiced similar concerns in its "Memorandum on the human rights implications of the measures taken under the state of emergency in Turkey". The Commissioner reflected upon a series of measures which seemed to target not just suspects directly, but also people who are in some ways connected to them, leading to the following conclusion: "The Commissioner is worried that such measures will inevitably fuel the impression of 'guilt by association'". In the opinion of the Commissioner these measures "should not exist in a democratic society, even during a state of emergency."[11]

4.2.3. Possession of Files

For some of the defendants, the main evidence against them are documents obtained from their computers or hotel rooms. Similar to the above-mentioned communications, the reader of the indictment is left in the dark regarding their incriminating status.

In one instance it seemed important to the prosecutor to point out, that a document included the note "Please do not share this document with anyone, do not leave it open on your computer or on your desktop". The indictment goes on to explain that this particular document included a list of names and phone numbers of many artists for a campaign. Since it seems quite reasonable to be asked not to share other people's personal contact information, the incriminating effects of having this document on one's computer stays unclear.

Other documents found concerned the well-known incident of two teachers, who went on hunger strike after being arbitrarily fired and who were later arrested for

[10] OHCHR Report on the impact of the state of emergency on human rights in Turkey, including an update on the South-East (March 2018) para 72
[11] CommDH(2016)35 (7 October 2016) para 41

suspicion of membership to a terrorist organisation. Given the fact, that many of the defendants have been openly campaigning for the release of the teachers, especially since they had not even been convicted of any terrorism charges at that point, it is not unusual to have material about the case on their computers. Again, the indictment seems to view contact with someone merely accused of terrorism as equivalent to convicted terrorism itself. In fact, this brings up severe concerns in regards to every other case, the prosecutor mentioned in this indictment. If he is charging defendants in the present indictment simply for being in contact with defendants of other cases, we are left to assume that the presumption of innocence for all those other cases has already been neglected, leading to multiple cross-connected violations of Art. 6(2) ECHR.

Many pages of the indictment are then dedicated to protocol notes of a meeting unrelated to the actual workshop. In this meeting, some of the defendants were present and various topics were discussed. The topic of the two arrested teachers as well as others on hunger strike came up, but mainly it was an exchange of thoughts on how to sustain momentum after protests or campaigns. In particular, they talked about their unsuccessful campaign against the April 2017 constitutional referendum on expanding presidential powers. It was even discussed, how many of the participants do not generally share common political views, but want to overcome their differences in order to prioritize the points on which they agree upon: demanding justice, freedom and democracy. To the legally objective eye, none of these demands seem to lead to the conclusion, that they must all be involved with any of the alleged terrorist organisations. To the reader of the indictment it is once again unclear, how the prosecutor came to the conclusion, that this protocol incriminates any of the defendants, unless of course he sees a terrorist agenda in demanding justice, freedom and democracy.

In fact, the prosecutor interprets these notes as an effort “to generate new uprisings similar to Gezi Park through the initiatives of organisations acting like NGOs but led by terrorist organizations”. The prosecutor’s idea seems to be, that people who wish to campaign against government policies are automatically affiliated with terrorist

organisations, simply because terrorists are also against the government. This implication, that even the discussion of organizing peaceful anti-government protests, must be considered as a threat to the constitutional order, is of course highly problematic in lights of Art 11 ECHR, the freedom of assembly and association.

4.2.4. Possession of the Phone Application "ByLock"

Throughout the indictment, there has been the recurring issue of the phone application "ByLock" playing a seemingly important role for the prosecution. ByLock is an encrypted messaging app. For elusive reasons, using or even downloading the app has repeatedly been seen as evidence for associating a suspect with terrorist organisations in past judicial cases in Turkey. In this indictment however, many of the defendants are not even accused of using the App, but of having contact with someone allegedly using the App.

In this context we would like to immediately refer to Opinions 42/2018[12], 44/2018[13], 29/2020[14] and 30/2020[15] of the United Nation's Working Group on Arbitrary Detention (WGAD), as well as the Communication 2980/2017[16] of the Human Rights Committee (HRC) concerning Arbitrary arrest and detention and access to justice. Both the WGAD and the HRC, strictly dismiss the mere use of the ByLock mobile application as sufficient basis for an arrest and detention of an individual.

In the analysed indictment, the prosecutor often refers to the fact that there are records available, documenting a defendant's conversation with someone who is "known to be a ByLock user". The conversations however, do not seem to be relevant enough to be included in the indictment, once again leading to the conclusion, that

[12] A/HRC/WGAD/2018/42 Opinion No. 42/2018 concerning Mestan Yayman (Turkey)
[13] A/HRC/WGAD/2018/44 Opinion No. 44/2018 concerning Muharrem Gençtürk (Turkey)
[14] A/HRC/WGAD/2020/29 Opinion No. 29/2020 concerning Akif Oruç (Turkey)
[15] A/HRC/WGAD/2020/30 Opinion No. 30/2020 concerning Faruk Serdar Köse (Turkey)
[16] CCPR/C/125/D/2980/2017

there was nothing incriminating in those conversations. It is also important to take into account, that the conversations have not been taking place via ByLock. They were merely with someone who was - according to the prosecutor - known to be a ByLock User. To the reader of the indictment it is quite confusing why being in contact with an assumed ByLock user is repeatedly listed as evidence - in some cases even the only evidence against a defendant. The allegation, that a defendant merely knows someone who is claimed to be a ByLock User, is nothing short of absurd to be charged for. Additionally, the government's system of identifying ByLock users has been known to be flawed in general.

To conclude: mere possession of an internationally available and widely downloaded phone application does not represent a criminal offence. But to prosecute someone, not for actually using the app, but instead for simply knowing someone who possesses or uses the App, certainly escapes any comprehensible logic, but more importantly, lies far outside any legal scope of action.

4.2.5. Bank Accounts and Transfers

Then there is the repeated issue of supposedly incriminating bank transfers made by some of the defendants. However, the indictment does once again fail to make any further claims as to how these transfers could possibly be linked to committing a crime. Some of the transfers were made to or from people or organisations who are under investigation for unrelated incidents. Again, it seems like an attempt to construct a connection to possible terrorist organisations without any factual proof or reason.

Also listed as evidence against some of the defendants is the simple fact, that they were having bank accounts at the Gülen linked "Bank Asya", even though this was a mainstream bank used by people across Turkey. Having an account there by itself, is certainly no evidence for being involved in any criminal activities.

4.2.6. Other Offences

Other accusations are based around the fact that some of the defendants were sending their children to a Gülen linked school. This alone does not necessarily suggest any ideological view or link to the organisation.

Another incident mentioned in the indictment, concerned documents addressed to the South Korean Embassy in Ankara to end the export of "gas" to Turkey. After some additional research, we found out that this was in reference to tear gas. This might only be a subtle difference in wording, but certainly a big difference in meaning, and said difference should be properly made clear in an indictment.

5: Analysis in terms of International Law

5.1. Presumption of Innocence

Art. 6(2) ECHR as well as Art. 14(2) ICCPR embody the principle of presumption of innocence: "Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law." This fundamental right to the protection of defendants in criminal trials imposes the burden of prove on the prosecutor[17] and guarantees that anybody accused of a crime has the benefit of doubt. Where circumstantial evidence is used, it is considered crucial to show that the causal relationship between evidence and crime has been properly assessed[18]. Moreover, it should be unambiguous[19] and substantial[20].

[17] Capeau v. Belgium, no. 42914/98 (13 January 2005) para. 25 and Navalnyy and Ofitserov v. Russia, no. 46632/14 (23 February 2016) para. 105
[18] H M A v. Spain (dec.), no. 25399/94 (9 April 1996)
[19] Mambro and Fioravanti v. Italy (dec.), no. 33995/96 (9 September 1998)
[20] Český and Kotík v. Czech Republic (dec.), no. 76800/01 (7 April 2009)

For multiple defendants the only evidence mentioned in the indictment is either possession of not necessarily incriminating documents that were found on their computers, or records of conversations with people who are under investigation for unrelated incidents, or mere contact with people who are presumed to have been using the mobile application ByLock. The indictment fails to further argue how the content of those conversations or documents are linking the defendants to the charged crimes, or any incriminating behaviour for that matter.

Including unrelated records as evidence and making unclear accusations against the defendants severely compromises the fair trial principle of presumption of innocence as guaranteed in Art. 6(2) ECHR.

5.2. Prompt Information about Nature and Cause

The need 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]" is emphasised in Art. 6(3)(a) ECHR as well as Art. 14(3)(a) ICCPR. This constitutes a right to full and detailed information about the allegations and subsequently enables the defence to prepare accordingly. The European Court of Human Rights established in its decisions many times that a defendant should not only be informed "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 the legal characterisation given to those acts."[21] Therefore, in as much detail and accuracy as possible it is the prosecutor's job to provide the related articles to the alleged crime(s).

At this point we also need to go into detail of an issue we briefly touched on above - in the indictment the prosecutor accused the defendants of "membership of an

[21] Pélissier and Sassi v. France, ECtHR no. 25444/94 (25 March 1999) para. 51

armed terrorist organisation" and "aiding armed terrorist organisations" citing Art. 314(2) and Art. 220(6) of the Turkish Penal Code (TPC).

Art. 220(6) TPC, however, reads as follows: "Any person who commits an offence on behalf of an organisation, although he [or she] is not a member of that organisation, shall also be sentenced for the offence of being a member of that organisation." As a prosecutor, when relating to this specific article, it seems to be more appropriate to use the phrase "committing an offence on behalf of an organisation" rather than "aiding armed terrorist organisations". More so given to the fact that the latter is covered by Art. 220(7) TPC stating: "Any person who aids and abets an organisation knowingly and willingly, although he does not belong to the structure of that organisation, shall also be sentenced for the offence of being a member of that organisation." In both instances, defendants are punished as though they were members, however two different allegations are described by law.

The prosecutor's language should always be clear and comprehensible and should not leave any room for speculation and misinterpretation. By referring to Art. 220(6) TPC as "aiding armed terrorist organisations" the prosecutor was in violation of Art. 6 ECHR and Art. 14 ICCPR, ripping the defendants off their right to be informed of the charges against them to prepare defence accordingly.

5.3. Guidelines on the Role of Prosecutors

The United Nations with its Guidelines on the Role of Prosecutors (UN Guidelines) sets out a set of standards to ensure a fair, impartial and efficient prosecution of criminal offences in all justice systems. Rules on qualification, selection and training of prosecutors but also on their position and duties in criminal proceedings were established.

Especially principles 10 to 16 on the active role of prosecutors in criminal proceedings are of major importance for the analysis of the prosecutor's approach to drafting present indictment. In line with those principles a prosecutor is expected to perform his or her 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" (principle 12 UN Guidelines). More specifically, a prosecutor should always be impartial and objective, take into account a defendant's position and interest and treat the information that emerges during the process confidentially (principle 13 UN Guidelines).

Unfortunately, the prosecutor, who drafted present indictment did not comply with these standards. Evidence in favour of the defendants was not included. Baseless allegations were made without managing to link them to unlawful conduct, as has been shown above. Basic human rights like the right to liberty and security or the right to a fair trial were ignored and violated in various ways. Already in the first paragraph it becomes apparent that the prosecutor did not act objectively nor impartially. Before even elaborating on the collected evidence, the prosecutor painted a colourful picture on how the defendants are linked to destruction, violence and plans to overthrow the Republic of Turkey. However, as analysed in depth above, the indictment did not manage to reveal any substantial evidence for these harsh allegations.

Instead of continuing the prosecution and drafting the indictment, the prosecutor should have stopped the investigation as soon as it was clear that the allegations against the defendants were unfounded. Rather it seems that the prosecutor resorted to coming up with whatever kind of "evidence" he could find, may it be lawful actions that were depicted as something they were not.

Therefore, the prosecutor did not proceed in good conduct with the standards of the UN Guidelines, on the contrary he seemed to actively violate them.

6: Conclusion and Recommendations

Throughout this indictment, the circumstances around the accused incriminating actions are largely exaggerated and most of them lack any legal reasoning. It seems there was no sufficient evidence linking the workshop and its organisers or

participants to any illegal activity, and subsequently an excessive amount of circumstantial evidence has been included to lend weight to the indictment.

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

Right from the start of the investigation against the eleven defendants, grave violations of human rights were observed, which persisted throughout the proceedings and reached a first peak with the issue of the indictment, that has been analysed. In that respect, the indictment's many deficiencies came to light, comprising of formal as well as material inaccuracies.

First of all, the indictment is not sufficiently structured and headlines are missing altogether leading to difficulties in understanding the allegations. The prominent tone of the prosecutor raises serious doubts about his objectivity and presents the defendants in a negative light.

Secondly, the prosecutor failed to come up with sufficient evidence to continue with the proceedings, let alone issue an indictment. Legal activity of human rights defenders should under no circumstances be criminalised. A conviction could have far-reaching consequences for civil society in Turkey, leading other human rights defenders to stop their work because of fear of prosecution. The prosecutor did not only fail to provide sufficient evidence in the first place, but also did not manage to successfully link the evidence to the alleged crimes, which is a prerequisite for a legally correct indictment.

Lastly, when referring to Turkish law the prosecutor used language that was misleading. At all times, a prosecutor should be aware of the major impact his or her words have and how they affect the defendants. Clear language, which leaves no room for interpretation is crucial to understand the accusations made and serves as guidance for the preparation of defence.

We strongly urge the process of criminal prosecution in Turkey to be reviewed and improved. Following steps could be taken:

1) Drafting a standard template, that can be used by prosecutors when drawing up the indictment. Thus, a clear format and headlines would already be predefined, helping the prosecutors to put together a structured document which provides all necessary details.

2) Legal training of prosecutors especially in regards to evidence based reasoning and how to connect them to the alleged crime. It seems to be no problem for the prosecutor to list the relevant charges on the one hand and evidence on the other. However, what the indictment clearly lacks is a section on how they are connected. As this is the most important part of an indictment, a prosecutor needs to understand the system and must be able to apply the necessary skills.

3) Regular awareness training, that includes discussing the UN Guidelines on the Role of Prosecutors, especially in light of the duty to carry out their function as prosecutors fairly, consistently and expeditiously, and to respect and protect human dignity and uphold human rights. Discussions could be centred around these standards and how they contribute to ensuring due process and the smooth functioning of the criminal justice system.