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BAR HUMAN RIGHTS  
COMMITTEE OF  
ENGLAND & WALES

Legal report on the

# **Cumhuriyet Indictment**

*PEN Norway's Turkey Indictment Project*

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# Turkey Indictment Project by PEN Norway

As PEN Norway, we are bringing up press and civil society related cases from Turkey with an innovative approach: The Turkey Indictment Project.

In 2020, with a team of judges, lawyers and scholars we are examining indictments from 12 prominent media and civil society cases, including Cumhuriyet, Buyukada and Gezi Park trials. Each report focuses on one indictment. An excellent group of legal and human rights experts from five different countries have assessed the 12 indictments' compliance with local regulations and international standards.

Our objective is to provide a tangible ground for discussions concerning the crisis of rule of law in Turkey and support dialogues that aim to improve the standards. You can find all published reports and articles on [norskpen.no](https://norskpen.no).

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 Bar Human Rights Committee of England and Wales

The Bar Human Rights Committee (“BHRC”) is the international human rights arm of the Bar of England and Wales. It is an independent body, distinct from the Bar Council of England and Wales, dedicated to promoting principles of justice and respect for fundamental human rights through the rule of law. It has a membership of lawyers, comprised of barristers practicing at the Bar of England and Wales, legal academics and law students. BHRC’s Executive Committee members and general members offer their services pro bono, alongside their independent legal practices, teaching commitments and/or legal studies.

The remit of BHRC extends to all countries of the world, apart from its own jurisdiction of England and Wales. This reflects the Committee's need to maintain its role as an independent but legally qualified observer and critic.

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*A translated version of the indictment was used to carry out the analysis. The translated version was abridged by the legal consultant who felt sections were not necessary for the exercise. Nevertheless, the translated version comprised over 150 pages and we are confident that this provided more than adequate material to demonstrate the content and allegations contained in the indictment.*

# Executive Summary

1. The indictment under examination, indictment no. 2017/1480, charges 19 defendants connected to the Cumhuriyet newspaper in various roles, including the chief editor, journalists, members of the Cumhuriyet Foundation Board of Directors / Executive Board members and accountants, with terrorism offences, by supporting FETO/PDY<sup>1</sup>, PKK/KCK<sup>2</sup> and DHKP/C<sup>3</sup>.
2. The indictment outlines that each of these defendants have expressed political views in disagreement with or criticising the State. However, it fails to properly set out why this constitutes a crime as opposed to a lawful exercise of the defendants' right to freedom of expression. The indictment therefore improperly equates disagreement with the State with supporting terrorism and thus a criminal offence. This plainly breaches Article 170(4) of the Turkish Criminal Procedure Code<sup>4</sup> ("TCPC") which provides, "*The events that comprise the charged crime shall be explained in the indictment in accordance to their relationship to the present evidence*". Moreover, it violates the Article 6(3) ECHR/Article 14 ICCPR right for a defendant to know the nature and cause of the charges brought against them, and the Article 10 ECHR/Article 19 ICCPR right to free speech.
3. Further, although the indictment purports to present many forms of "evidence", including articles published in the Cumhuriyet newspaper, social media posts, phone data, financial records and witness testimony, it fails to point to any evidence capable of proving that the defendants have committed a crime. This constitutes a breach of Article 170(2) of the TCPC, which requires that there is sufficient suspicion that a crime has been committed before an indictment is prepared.

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<sup>1</sup> The Turkish government officially designated the religious movement of Fethullah Gulen a terrorist group under the names Fethullah Terrorist Organisation (*Fethullahci Teror Orgutu*) and Parallel State Structure (*Paralel Devlet Yapilanmasi*): <https://www.reuters.com/article/us-turkey-gulen/turkey-officially-designates-gulen-religious-group-as-terrorists-idUSKCN0YM167>

<sup>2</sup> The Kurdistan Worker's Party (*Partiya Karkeren Kusidstane*) was formed in the late 1970s, calling for an independent Kurdish state within Turkey. The Kurdistan Communities Union (*Koma Civaken Kurdistan*) serves as an umbrella organisation which includes the PKK: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/866092/Turkey\\_country\\_policy\\_and\\_information\\_note\\_Kurdistan\\_workers\\_party\\_PKK\\_February\\_2020.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/866092/Turkey_country_policy_and_information_note_Kurdistan_workers_party_PKK_February_2020.pdf)

<sup>3</sup> The Revolutionary People's Liberation Party-Front (DHKP/C) is an extreme-left group aiming to replace the Turkish Government with a Marxist one, and has been branded a terror organisation by the US and the EU: <https://www.bbc.co.uk/news/world-europe-21296893>

<sup>4</sup> Translated version accessed at:

[https://www.legislationline.org/download/id/4257/file/Turkey\\_CPC\\_2009\\_en.pdf](https://www.legislationline.org/download/id/4257/file/Turkey_CPC_2009_en.pdf)

4. Additionally, the indictment does not set out the issues in the defendants' favour, in breach of the requirement for balance under Article 170(5) of the TCPC. The indictment fails to consider or take into account any of the aspects of the case which may be construed in favour of the defendants.
5. Significantly, the legal analysis in the indictment of key judgments of the European Court of Human Rights ("ECtHR") is inaccurate and distorted. In particular, there is a tendency to overlook passages in judgments, including the *ratio*, in favour of citing *obiter* which may assist the prosecution. This risks the Turkish courts being misled and falling into error. Crucially, the limited scope to which expression on political matters in the media can be curtailed through restriction and prosecution is erroneously presented. The ECtHR in the case of *Sabuncu v Turkey* has in fact recently reviewed the evidence in this very case and concluded that it demonstrates legitimate commentary by the press, such that the prosecution violates the Convention rights of the Defendants.
6. The indictment makes an essentially *political* statement, using highly emotive language, rather than a legal pleading. It is repetitive and rambling, omitting relevant material and including irrelevant material, none of which should occur in a legal document.
7. There is a danger that the political colour of the indictment will adversely affect the fairness of proceedings. Any opposition to the indictment, whether through disputing the facts or challenging its legality, could be taken as disagreement with the political views expressed therein, risking a conviction based wholly on the defendants' political views as opposed to whether the defendants have committed any criminal offences. As it stands, it is difficult, if not impossible, to set out a defence without appearing to reject the political assertions in the indictment. Purely political charges cannot be contested on a legal basis, and that is the problem with them.
8. Of particular concern is that the association of press commentary with terrorism asserted in this indictment risks broader interference with the right to a fair trial. By implication, were the trial judges to acquit the Defendants, this could be taken as disagreeing with the State, which in turn could be seen as tantamount to supporting terrorism. Given that members of the judiciary in Turkey have been arrested and charged for making independent findings with which the State does not agree, this is a genuine cause for concern. An indictment such as this risks undermining judicial independence.
9. The indictment clearly reflects an intention by the Public Prosecutor to expand restrictions upon freedom of expression without recognising the solid body of

law confirming that the press has the right, and also the duty, to impart information on political issues.

## Summary of the background to the indictment

10. Cumhuriyet newspaper was founded in 1924 and is one of Turkey's oldest newspapers. It has been owned by the Cumhuriyet Foundation since 2001. Described by British media as a newspaper which was "left-leaning and pro-secular"<sup>5</sup> and "having maintained fierce independence in an increasingly State-controlled media environment"<sup>6</sup>, Cumhuriyet newspaper was awarded the Freedom of Press Prize by Reporters Without Borders in 2015<sup>7</sup>.
11. The indictment under examination, indictment no. 2017/1480, charges 19 defendants connected to the Cumhuriyet newspaper in various roles, including the chief editor, journalists, members of the Cumhuriyet Foundation Board of Directors / Executive Board members and accountants, with terrorism offences, by supporting FETO/PDY<sup>8</sup>, PKK/KCK<sup>9</sup> and DHKP/C<sup>10</sup>. This has been regarded as part of the government's response to the coup attempt in July 2016; indeed, the indictment refers to the coup attempt and alleges the defendants' support for it.

## Evaluation of the indictment in accordance with Turkish law

12. Article 170 of the TCPC sets out the requirements for filing a public prosecution, the responsibility for which rests with the public prosecutor.

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<sup>5</sup> <https://www.theguardian.com/world/2016/oct/31/turkey-detains-editor-and-staff-at-opposition-cumhuriyet-newspaper>

<sup>6</sup> <https://www.bbc.co.uk/news/world-europe-43899489>

<sup>7</sup> <https://rsf.org/en/news/reporters-without-borders-tv5-monde-prize-ceremony>

<sup>8</sup> The Turkish government officially designated the religious movement of Fethullah Gulen a terrorist group under the names Fethullah Terrorist Organisation (*Fethullahci Teror Orgutu*) and Parallel State Structure (*Paralel Devlet Yapilanmasi*): <https://www.reuters.com/article/us-turkey-gulen/turkey-officially-designates-gulen-religious-group-as-terrorists-idUSKCN0YM167>

<sup>9</sup> The Kurdistan Worker's Party (*Partiya Karkeren Kusidstane*) was formed in the late 1970s, calling for an independent Kurdish state within Turkey. The Kurdistan Communities Union (*Koma Civaken Kurdistan*) serves as an umbrella organisation which includes the PKK: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/866092/Turkey\\_country\\_policy\\_and\\_information\\_note\\_Kurdistan\\_workers\\_party\\_PKK\\_February\\_2020.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/866092/Turkey_country_policy_and_information_note_Kurdistan_workers_party_PKK_February_2020.pdf)

<sup>10</sup> The Revolutionary People's Liberation Party-Front (DHKP/C) is an extreme-left group aiming to replace the Turkish Government with a Marxist one, and has been branded a terror organisation by the US and the EU: <https://www.bbc.co.uk/news/world-europe-21296893>

13. Article 170(2) provides, “In cases where, at the end of the investigation phase, collected evidence constitutes sufficient suspicion that a crime has been committed, the public prosecutor shall prepare an indictment”.
14. Article 170(3) sets out the formal requirements for a valid indictment, which include:
  - a. The identity of the suspect [170(3)(a)];
  - b. His defence counsel [170(3)(b)];
  - c. The crime charged and related Articles of the applicable Criminal Code [170(3)(h)];
  - d. The place, date and time period of the alleged offence [170(3)(i)]; and
  - e. Evidence of the offence [170(3)(j)].
15. Article 170(4) states: “The events that comprise the crime charged shall be explained in the indictment in accordance to their relationship to the present evidence”.
16. Article 170(5) stipulates: “The conclusion section of the indictment shall include not only the issues that are unfavourable to the suspect, but also issues in his favour”.
17. From the legal requirements of a valid indictment set out above, the basic expectation of a Turkish indictment would be a document which:
  - f. Provides clarity as to what has been charged;
  - g. Presents a sound legal basis for bringing the charges; and
  - h. Strikes a fair balance between the allegations raised and the defence case.
18. This report now examines each of the sections in the indictment where translations have been provided, to assess what, if any, breaches of Turkish law are present.

### **The formalities of the indictment**

19. *Prima facie*, the requirements of Article 170(3)(a), (b), (h), (i) and (j) are met in the first nine pages of the indictment, which list the defendants’ names, attorneys, arrest dates, as well as the offences each defendant is charged with:
  - a. Can Dündar, Akın Atalay, Mehmet Orhan Erinç, Bülent Utku, Mehmet Murat Sabuncu, Ahmet Kadri Gürsel, Güray Tekin Öz, Önder Çelik, Turhan Günay, Hacı Musa Kart, Hakan Karasinir, Mustafa Kemal Güngör, Aydın Engin, Hikmet Aslan Çetinkaya, Bülent Yener, Günseli Özaltay, and Ahmet Şık are charged with assisting an armed terrorist organisation though not

- a member of that organisation, under Article 314(2) of the Turkish Criminal Code<sup>11</sup> (“TCC”) pursuant to Article 220(7) of the TCC<sup>12</sup>;
  - b. İlhan Tanir is charged with being a member of an armed terrorist organisation, under Article 314(2) of the TCC;
  - c. Ahmet Kemal Aydogdu is charged with management of an armed terrorist organisation, under Article 314(1) of the TCC<sup>13</sup>;
  - d. Akın Atalay, Mehmet Orhan Erinç, Bülent Utku, Güray Tekin Öz, Önder Çelik, Turhan Günay, Hacı Musa Kart, Hakan Karasinir, Mustafa Kemal Güngör and Hikmet Aslan Çetinkaya are also charged with abuse of trust in the provision of a service, under Article 155(2) of the TCC<sup>14</sup>.
20. However, when looking at its substance, the indictment is fundamentally defective in the following ways:
- a. The elements which constitute the offences are not set out;
  - b. There is no explanation of what must be proved for a defendant to be convicted of the offence;
  - c. There is no reference to any applicable statutory defence; and
  - d. There is no explanation of what conduct constituted the offences in each defendant’s case.
21. Accordingly, a defendant would be left entirely unclear as to the basis of any charge against him, or as to the availability of any statutory defence.
22. Further – and quite fundamentally – the indictment fails even to give a clear date for the alleged offences. The only references provided is to, “*The year 2016 and prior*” which is wholly inadequate to enable the defendants to understand the case against him.
23. This section of the indictment gives a cursory nod to fulfilling the requirements of Article 170(3)(j) by listing, in generic terms, the evidence relied upon as:

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<sup>11</sup> Translated version accessed at:

[https://www.legislationline.org/download/id/6453/file/Turkey\\_CC\\_2004\\_am2016\\_en.pdf](https://www.legislationline.org/download/id/6453/file/Turkey_CC_2004_am2016_en.pdf)

<sup>12</sup> Article 220/7 stipulates: *Any person who aids or 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.*

<sup>13</sup> Article 314 of the TCC states:

(1) Any person who establishes or commands an armed organisation with the purpose of committing the offences listed in parts four and five of this chapter, shall be sentenced to a penalty of imprisonment for a term of ten to fifteen years.

(2) Any person who becomes a member of the organisation defined in paragraph one shall be sentenced to a penalty of imprisonment for a term of five to ten years.

<sup>14</sup> Article 155(2) of the TCC states:

Where the offence is committed in relation to property which was submitted and delivered as a requirement to confer authority to administer such property, and this authority is derived from a professional, trade, commercial or service relationship or any other reason, the offender shall be sentenced to a penalty of imprisonment for a term of one to seven years and a judicial fine of up to three thousand days.

- a. The ByLock communication record and analysis report of the Directorate General of Police;
  - b. Istanbul Police Directorate Anti-Terrorism Branch ByLock analysis reports;
  - c. Historic Traffic Search base station analysis records;
  - d. Inspection reports of the Directorate General of Foundations;
  - e. Expert reports;
  - f. Financial Crimes Investigation Committee reports;
  - g. Open source detections records;
  - h. Search, apprehension and seizure records;
  - i. Suspect and witness testimony;
  - j. Copies of Cumhuriyet newspaper;
  - k. Column articles written by the defendants;
  - l. Printouts of news in the internet content of newspapers;
  - m. Copies of judicial record statements for the defendants; and
  - n. The entirety of the investigation documents.
24. Such a list would not be adequate to fulfil Article 170(3)(j) on its own. However, the indictment runs to 246 pages, in which the evidence – or what is purported to be evidence – is fleshed out in greater detail.

***“The investigation document was examined” section of the indictment***

25. The next section is headed, “The investigation document was examined”, and contains a summary of the history of Cumhuriyet newspaper, culminating in how it *“exercised manipulation in order to conceal the truth, and ... acted in line with the objectives of the FETO/PDY, PKK/KCK and DHKP/C terrorist organisations in order to provoke civil unrest and render the country ungovernable by presenting these articles and stories”* which are critical of the government and, the indictment suggests, legitimises the violence of terrorist groups.
26. In direct contrast to the factual tone of the indictment preceding this section, this language is inflammatory, and strays far from the legal and – unnecessarily for a legal document – deep into the political arena.
27. This section contains no legal basis and provides no evidence against the defendants, but sets the scene for the backdrop of the allegations, alleging Cumhuriyet had broken with its 90 year history by *“attempt[ing] to influence the agenda in a way that is not in keeping with its readership’s world view”*, through *“producing news items which sought to manipulate with destructive and separatist effect”*.

28. The indictment states Cumhuriyet newspaper was taken over by the armed terrorist organisation FETO/PDY in 2013, when Can Dündar became chief editor.
29. A number of significant assertions are made here without supporting evidence:
- a. *"It is commonly known that any coup attempt will be preceded by an effort to prepare the country for the coup, using organs of press and media"*. No support is provided to back such a sweeping statement or how this conclusion – presented as common knowledge – has been reached;
  - b. *"Manipulation is a way of imposing upon the public. It is also a method of influencing, steering and confusing people. Today it is the most important secret tool of psychological operations."* Again, nothing is provided to substantiate this claim;
  - c. *"It has been determined from the many articles which have been published that the suspects in our case file are responsible for using this method to present various terrorist organizations ... and their members as innocent and to present their actions as legitimate"*. There is no explanation of who reached this determination, when it was reached and on what basis;
  - d. *"In short, it is apparent that the defendants, with the radical change they made after 2013, intended to bring the Republic of Turkey and the Government into difficulties, to ruin their reputation domestically and internationally, and to expose the country to civil and criminal liability before international judicial institutions by creating a perception that the government had aided and supported terrorist organizations such as ISIS"*. This is just as disturbing, given that no basis is provided as to how the defendants' intend to carry out such serious and specific allegations was suspected, let alone made apparent.
30. While this section may intend to be an executive summary of the case rather than a conclusion, it nevertheless contravenes Article 170(5) TCCP in that it lacks any semblance of balance and in particular fails to outline or consider any factors in the defendants' favour. For example, the indictment fails to make reference to any innocent explanation given by the defendants, or strikingly to principles concerning the freedom of the press and the right to freedom of expression. As raised earlier, the matters presented in this section appear to criminalise political expression and commentary – conflating criticism contrary to government's views with alignment with a terrorist organisation. The indictment fails to consider the issue of intent entirely.
31. The problems for the defence are manifest: any admission of simply having an alternate political view automatically becomes, within such a framework, an admission to the guilt of assisting an armed terrorist organisation. Likewise, any judge receiving such an indictment will also be receiving a forceful implicit

message: a not guilty verdict could be construed as disagreement with the government's political views, and judicial assistance to a terrorist organisation.

### **Section I: "Introduction"**

32. The indictment then has a section headed "Introduction", which purports to be an analysis of the law regarding freedom of the press, the right to publish periodicals and non-periodicals, the right to use media other than the press owned by public corporations and the right of rectify and reply (Articles 28, 29, 31 and 32 of the Turkish Constitution, respectively).
33. These rights are then scrutinised in the context of the case law stemming from the ECtHR regarding freedom of expression as set out in Article 10 ECHR, as well as domestic case law and a number of academic publications.
34. The indictment states, "*Since freedom of the press can only find meaning in a democratic society, merely the act of not condemning the acts of a terrorist organization operating with the objective of destroying the constitutional order and seriously damaging public order shall mean implied support for terrorism*". The case of *Batasuna v Spain*, nos. 25803/04 and 25817/04, §88, ECHR 2009 is cited as the basis for this proposition, quoting from the judgment:

*"The Court agrees with the grounds on which the Constitutional Court ruled that the refusal to condemn violence against a backdrop of terrorism that had been in place for more than thirty years and condemned by all the other political parties amounted to tacit support for terrorism"*.

35. The legal analysis in this section ignores the key sections from the authorities it cites which contradict the indictment's central arguments, even where those same authorities are cited.
36. As an example, the indictment cites paragraph 88 of *Batasuna v Spain*, but glosses over the fact that:
  - a. The failure to condemn violent actions was not the only reason Batasuna was dissolved, there had also been a series of serious and repeated acts and conduct; and
  - b. It was such conduct in *combination* which had made it possible to conclude there had been "an accommodation with terror going against organised coexistence in the framework of a democratic State".

37. Instead of recognising that purely passive non-condemnation would be insufficient to constitute support for terrorism, the indictment uses this case to suggest that the same responsibilities which apply to political parties should apply to the media.
38. The indictment's reading of *Sener v Turkey*, App. no. 26680/95, (Judgment 18<sup>th</sup> July 2000), is equally erroneous. The indictment quotes an extract from paragraph 42 of the judgment:

*"Particular caution is called for when consideration is being given to the publication of views which contain incitement to violence against the State lest the media become a vehicle for the dissemination of hate speech and the promotion of violence".*

39. However, the passage immediately following it has been excised:

*"At the same time, where such views cannot be so categorised, Contracting States cannot, with reference to the protection of territorial integrity or national security or the prevention of crime or disorder, restrict the right of the public to be informed of them by bringing the weight of the criminal law to bear on the media".*

40. In *Sener*, when determining whether or not there was a breach of Article 10 ECHR, the Court considered as essential: a) whether or not the article taken as a whole glorified violence; and b) whether or not it incited people to hatred, revenge or recrimination or armed resistance [para 45].
41. The indictment also cites the case of *Zana v Turkey*, App. No. 69/1996/688/880 (Judgment 25<sup>th</sup> November 1997) where the Court noted at para 60, the interview in question was published by a major national daily newspaper, i.e. *Cumhuriyet*, on 30<sup>th</sup> August 1987. The indictment extrapolates from this judgment, asserting, *"therefore, all publications and social media posts from the national daily newspaper Cumhuriyet must be considered taking into account their capacity to cause impact in our present day"*, with no further explanation. At the same time, it completely ignores the reasoning in the judgment that Article 10 ECHR protects information or ideas which "offend, shock or disturb", as well as those which are favourably received or are regarded as inoffensive or as a matter of indifference; exceptions to Article 10 are to be construed strictly and any restrictions to be established convincingly [para 51].
42. Likewise, in *Surek v Turkey (No.3)* (GC) App. no. 24735/94 (judgment 8<sup>th</sup> July 1999), the only part of the judgment which the indictment refers to is that to the

effect that those with the power to shape the editorial direction of the review are vicariously subject to the duties and responsibilities which the editorial and journalist staff undertake. However, the indictment pays no heed to the central finding by the Court that:

*"...in a democratic system the actions or omissions of the government must be subject to the close scrutiny not only of legislative and judicial authorities but also of public opinion" [para 37], and that "the dominant position which the government occupies makes it necessary for it to display restraint in reposting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries" [para 37].*

43. The fact that case-law is cited selectively in this indictment, whether through design or negligence, is highly problematic not only because it appears impartial but also because it risks misleading the tribunal, thereby allowing the tribunal to fall into error.

### **Evaluation of the evidence presented in the indictment**

44. The indictment then moves on to deal with the details of the evidence against the defendants. Section II lists the professions of the defendants. Sections III to VI provide information about the FETO/PDY, PKK/KCK and DHKP/C terrorist groups and does not contain evidence against the defendants.

### **Section VII: "KOM (Department of Anti-smuggling and organised crime)**

#### **branch analysis reports - A: ByLock use"**

45. The indictment lists the registered phone numbers of the defendants. In the case against Orhan Enric, the indictment states Mr Enric's number had "connections" to eight other phone numbers registered to / used by eight individuals / companies, all of whom are suspects in various investigations. No further information is provided.
46. This section of the indictment is defective because:
- a. It does not point to any evidence to support the assertion that the phones were *registered* to the individuals / companies;
  - b. It does not point to any evidence to support the assertion that the phones were *used* by the alleged individuals / companies;
  - c. There is no description of any of the investigations into the individuals / companies;
  - d. There is no explanation of what is meant by Mr Enric's phone having "connections" to the other phone numbers referred to; and

- e. There is no evidence as to what “connections” exist between Mr Enric’s phone and the other numbers.
47. Contrary to Article 170(4) of the TCPC, the indictment fails to exhibit any concrete evidence of a criminal offence, but also any balance such as required under Article 170 (5) of the TCPC. The defence is therefore inevitably prejudiced because it is not clear what the prosecution case is that they must meet.
48. The indictment refers to ByLock, an app which was widely available on Apple’s iTunes Store and Google Play from 2014 (prior to it being shut down in March 2016 by the Turkish National Intelligence Organisation (“MIT”))<sup>15</sup>. The indictment describes it as an “*encrypted communication tool determined to be used by the FETO/PDY armed terrorist organisation leaders and members*”. In support of this assertion, the indictment refers to a report prepared by the Istanbul Provincial Police Headquarters Department of Anti-Smuggling and Organised Crime, dated 25<sup>th</sup> March 2017. However, no further details about the report are provided.
49. The indictment takes matters a step further when it puts forward as part of the evidence against Mr Erinç, the allegation that his registered phone had connections to three separate phone numbers, each of which have been determined to be ByLock users. No specifics are given in respect of what kind of “connection” Mr Enric’s phone had with any of the other phone numbers. The indictment does not point to any evidence in support of the assertion that the users of those numbers were ByLock users, less still that they were misusing Bylock for nefarious purposes. Further, there is no evidence about use of ByLock in the general population to establish anything incriminating about Mr Erinç’s alleged connection with it.
50. The above represents but one of many instances in the indictment where propositions are not linked to any evidence. For these reasons, the indictment fails to comply with Articles 170 (4) and (5) TCPC.

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<sup>15</sup> A detailed analysis of the difficulties with attributing the ByLock app usage solely to FETO/PDY and thus the dangers of using the app as evidence of being a member of / supporting a terrorist organisation is set out in “*Opinion on the legality of the actions of the Turkish Stage in the aftermath of the failed coup attempt in 2016 & the reliance on use of the ByLock app as evidence of membership of a Terrorist Organisation*”, William Clegg QC and Simon Baker, 25<sup>th</sup> July 2017, which can be found at: <http://2oq5cg28288838bmfu32g94v-wpengine.netdna-ssl.com/wp-content/uploads/2017/09/Redacted-Opinion.pdf>.

## Section IX A: "Social Media Posts"

51. The indictment suggests that FETO/PDY used social media effectively, including a Twitter account "Fuat Avni", *"It is apparent that the [FETO/PDY] first started spreading this false information for manipulative purposes through its social media accounts using hashtags, then popularised them through retweets, before finally moving them to the organisation's written and visual press on websites to reach even wider audiences"*. The indictment, however, does not refer to any evidence in support of this "apparent" process of manipulating false information.
52. The indictment continues, *"It has been concluded that the baseless and false claims made on the account of "fuatavni" were shown special interest by the Cumhuriyet newspaper in a column created for this very purpose in the newspaper, which thereby assisted in conveying them to a wider audience"*.
53. This sentence alone makes several contentions, none of which are supported by evidence:
  - a. There is no clarification of who has reached this conclusion, why, when or how;
  - b. The content of the "baseless and false claims" made from the Fuat Avni account is unspecified;
  - c. There is no evidence of what kind of "special interest" the Fuat Avni account was shown by the Cumhuriyet newspaper.
54. The indictment then lists a catalogue of posts on social media made by Akın Atalay and Mehmet Murat Sabuncu, and notes, *"most of these posts are regarded as attempts to shape perceptions in favour of the FETO/PDY"*. None of the posts listed, however, suggest any support for violence or terrorist groups.
55. A post by Ahmet Kemal Aydogdu, using the account "JeansBiri", referring to #Aksilahanma (white armament), and articles on Cumhuriyet newspaper on *"White Armament Provocation"* are introduced in the indictment, as is an article by Aydın Engin titled, *"AKSK(AK Armed forces)"*. Again, there is nothing in the article which could reasonably be construed as supporting violence.
56. The indictment does not explain why these posts go beyond media reporting and a free press and give rise to a criminal offence. This failure is critical as the indictment, as it stands, does not establish on what legal basis the defendants are being prosecuted and once again is in breach of Articles 170 (4) and (5) TCPC.

## **Section IX B: “Can Dündar being the Chief Editor and the MIT trucks article”**

57. On 1<sup>st</sup> January 2014, MIT trucks were stopped in the Hatay province; on 19<sup>th</sup> January 2014, MIT trucks were stopped in the Ceyhun district of Adana. A ban on publication concerning the MIT trucks was issued under Press law 5187 Article 3(2) by the Adana Court of Peace Judgeship, on 14<sup>th</sup> January 2015, case file no. 2015/197.
58. The indictment states that due to Mr Dündar and Mr Gul publishing the images and investigation files in respect of the MIT trucks in the 29<sup>th</sup> May 2015 and 12<sup>th</sup> June 2015 editions of Cumhuriyet, a public case was filed against them. They were both charged with disclosure of information relating to the security and political interests of the State under Article 329(1) TCC. The Istanbul 14<sup>th</sup> Criminal Court ruling no.2016/162 dated 6<sup>th</sup> May 2016 sentenced Mr Dündar to 5 years and 10 months’ imprisonment.
59. The indictment then declares, *“It appears the file accusing defendant Can Dündar of assisting an armed terrorist organisation without being a member has been filed as a separate case”*.
60. There is nothing in the indictment which suggests there is any additional element (over and above what Mr Dündar has already been convicted for) to give rise to the allegation that Mr Dündar is now assisting an armed terrorist organisation. This presents serious *prima facie* concerns that Mr Dündar is facing in this indictment a further prosecution based on the same facts. As Protocol No. 7 to the ECHR has entered into force in Turkey from 1<sup>st</sup> August 2018<sup>16</sup>, any Turkish indictment must comply with Article 4 (1):
- “No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State”*.
61. Another striking aspect of this section of the indictment is its conclusion, which reads, *“Although Cumhuriyet newspaper attempted to shape perceptions to show the Republic of Turkey as having worked in aid of ISIS, given Turkey directed a*

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<sup>16</sup> Ratified by Turkey in 2016, <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/country/TUR>

heavy blow against this terrorist organisation as part of its Operation Euphrates Shield, launched in August 2016, it is clear that the truth over its claims Turkey aided ISIS, an organisation it was at war with, are clear to the public<sup>17</sup>". This appears to be a wholly political statement and certainly does not amount to a proper legal pleading.

### **Section IX C: "News and Articles that are Chronologically Accepted as Evidence"**

62. Reliance is placed on an expert report provided by Unal Aldemir on the topic of "manipulation". No credentials are provided, nor is the exact scope of the report, the report itself, or its methodology explained. A full page of this report is quoted in the indictment, including the following excerpts: *"Interest groups, illegal organisations and terrorists wish to achieve their goals at zero cost through media organs. Responding to these wishes is not journalism, but serving the objectives of these interest groups, being instrumental in their illegal organisation and distributing terrorist propaganda"*. The indictment continues to expound on this theory: *"Concealing the truth through manipulation, acting in line with the objectives of terrorist organisations, creating internal conflicts and making the country ungovernable is not journalism. Attempting to destroy the Republic of Turkey and its government or partially or entirely preventing them from carrying out its duties in the same way, through media ... is not freedom of the press, it is a psychological operation carried out under the guise of freedom of the press"*. The report suggests, *"Cumhuriyet newspaper has released news to manipulate and conceal the truth, to act in line with the objectives of terrorist organisations (FETO), to create unrest and to make the country ungovernable"*. The indictment appears to rely upon this expert report to prove facts which are not properly the subject of expert opinion, such as the intentions of those behind the Cumhuriyet newspaper.
63. The indictment turns to Hikmet Çetinkaya and articles and statements in respect of the Fetullah Gulen Organisation. The reader's attention is drawn to a statement made by Mr Çetinkaya on 31<sup>st</sup> October 2015, concluding, *"I have never said and could never say, in my articles, that the Gulen movement is a terrorist organisation"*<sup>18</sup>. As his defence, Mr Çetinkaya declares, "he defends law, democracy and human rights".

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<sup>17</sup> In the translation I have been provided with, this conclusion is in **bold** and the font is enlarged from, "It is clear that...".

<sup>18</sup> This portion is **UNDERLINED AND IN BOLD CAPITALS**

64. The indictment lists a series of articles penned by Can Dündar, Aydın Engin, Ahmet Kadri Gürsel from December 2013 to August 2016. Read objectively, none of these articles can be said to be inciting violence or supporting terrorism. The indictment provides no explanation of the significance of the articles, or how they relate to the charges against the defendants.
65. In respect of the article authored by Mr Engin, published on his website T24 on 3<sup>rd</sup> February 2014, the indictment makes the following assessment: *"While it appears that the writer is presenting some criticisms directed at both AKP and the FETO/PDY terrorist organisation in his article, when the article is considered in general it is apparent that phrases supporting the FETO/PDY terrorist organisation have been used"*. This is confusing, as the passages the indictment suggest are supporting the FETO/PDY are unspecified, and also ignores Mr Engin's proposition, *"We should only be on the side of democracy and the legal state"*.
66. An interview with KCK Co-Chairman Cemil Bayik, published on 2<sup>nd</sup> June 2015 is described as being an *"article that appears to praise and try to enamour sympathy for the PKK/KCK terrorist organisation by appealing to young people and nongovernmental organisations through subjects like 'environmental sensitivity' and male-female equality"*. The purported connection between reporting on environmental issues or gender equality and raising sympathy for a terrorist organisation is entirely unclear.
67. Some articles are referred to only by their titles. The headline, *"War in the Country, War in the World"*, dated 25<sup>th</sup> July 2016 is said to be *"worth noting"* in the indictment as those behind the 15<sup>th</sup> July 2016 coup attempt used the phrase, *"Peace in the Country Council"*. The indictment has also picked out some headlines which were published simultaneously in both the Cumhuriyet and the Zaman newspaper, the latter is described as *"the FETO/PD's media organ"*. An article published on 13<sup>th</sup> July 2016 by Mr Engin with the headline, *"Peace in the World, but what about at Home?"* is linked to another phrase used by the coup attempters, *"The Peace at Home Council"*.
68. Whilst the prosecutor is entitled to rely upon the evidence they determine relevant, the weight to be attached to each sentence in an article is not a judgment for the prosecutor and ascribed meaning should not be presented as a foregone conclusion, especially without further supporting evidence. The quality of the indictment as a legal document would be much improved by it specifying how each of the articles amount to *criminal* behaviour, as opposed to expressing a view with which the prosecutor – or the State – does not agree. A failure to do so, as in this case, gives the overwhelming impression of serving to criminalise legitimate dissent.

## **Section X: “Other indications connected to the change in publication policy”**

### *A: “Drop in Newspaper circulation”*

69. The indictment records the readership of Cumhuriyet newspaper fell by approximately half when comparing July 2008 and July 2016. The source of the figures is provided as an attachment to a letter from the Press Announcement Association no. E.435/2016-112127, dated 4<sup>th</sup> November 2016. It is unclear whether Cumhuriyet newspaper provided any figures of its own or was requested to do so.
70. This decline in circulation is put down to the *“readers have clearly shown their reaction to the radical change in publication policy of Cumhuriyet newspaper”*. No other factors, economic or otherwise, are raised or considered. Assuming that this bold assertion is correct, there is no explanation for how the readership showing their reaction to a change in publication policy indicates the commission of a criminal offence.

### *B: “CUMOK’s Reaction”*

71. The Cumhuriyet Newspapers Readers Platform (CUMOK) is a non-governmental organisation, which has been communicating with the Cumhuriyet newspaper since 1995.
72. The indictment refers to a statement by 330 of the readers sent to the Cumhuriyet newspapers on 11<sup>th</sup> February 2015, citing concerns about the changes in the Cumhuriyet Foundation. During an interview, the Istanbul Coordinator Namik Mela Boya suggested that if the management were concerned about circulation, *“they would not be trying to ruin, shake and damage with a series of Imperialist policies and postmodern attitude, the organic relationship that the Cumhuriyet newspaper needs to establish with the republic of Turkey”*. Again, this is the opinion of Mr Boya, and not fact. The indictment provides no assistance as to how this opinion is evidence of a criminal offence being committed.

### *C: Various complaints that have come into our public prosecutor*

73. The following complaints are referred to in the indictment:
  - a. Complaint made on 19<sup>th</sup> July 2016, claiming the Cumhuriyet newspaper was distorting events and reporting news with the intention of protecting FETO/PDY;

b. Complaint made on 14<sup>th</sup> August 2016, claiming the Cumhuriyet newspaper had published news in favour of HDP.

74. The individuals who made the complaints are not disclosed, nor is the evidence upon which the complaint is based. The status of the complaints – whether dismissed, pending an outcome, upheld, or otherwise – have not been provided.
75. An investigation, and subsequently indictment no.2016/4302, dated 14<sup>th</sup> November 2016 was issued in respect of an article covering the interview of PKK/KCK member Murat Karayilan by the Cumhuriyet newspaper on 21<sup>st</sup> December 2015. The indictment states that the case was filed “*due to the publication and distribution of statements and claims that legitimised or praised the violent, forceful and threatening acts committed by terrorist organisations and encouraging a [sic] resort to these methods*”. What the indictment fails to indicate is how that separate indictment demonstrates a crime being committed by the defendants in this indictment.

*D: “News and articles accepted as warnings and evidence released in the national press and internet news websites”*

76. Thirteen articles in the press have been listed in the indictment, but without any further indication of how they amount to evidence of a crime being committed. The veracity of the listed articles has not been examined (or if it was, this is not set out in the indictment), leaving a large question mark over what weight, if any, can be attached to them.
77. The indictment focusses upon one article entitled, “*The headlines of deceit by the scraps of terrorism*” from the Medyagundem news website, dated 1<sup>st</sup> November 2016, summarising its assertions that “*for the past three years the Cumhuriyet Newspaper had forged an alliance with terrorist organisations FETO and the PKK*”, in turn listing twenty articles published in the Cumhuriyet newspaper as examples. The accuracy of this comment is not questioned or otherwise substantiated in the indictment.

*E: “Ilhan Tanir be made the US reporter”*

78. Ilhan Tanir is also a suspect under investigation no. 2014/107276 on the media structure of the FETO/PDY armed terrorist organisation. The indictment states that the investigation document on Mr Tanir is relevant to this indictment; however, no explanation of how it is relevant, nor particulars of the document are provided.

79. The indictment declares, *"It has been determined that in articles written by the defendant targeting the Esteemed President personally for some time and by creating the impression of a journalist that has influential connections in the U.S. and reliable sources, the defendant tried to portray an image of Turkey as a country isolated from foreign relations and which did not show the necessary decisiveness in combating terrorist organisations and ... was an ungovernable country that turned a blind eye to, or assisted ISIS"*. Who has determined this, how the conclusion was reached, and how that determination gives rise to Mr Tanir being guilty of being a member of an armed terrorist organisation are all unexplained.
80. Articles criticising Mr Tanir are provided in the indictment, again, without establishing the veracity of their content, and are presented as fact. The indictment has its own views, *"It is clear that the ties defendant Ilhan Tanir has with the FETO/PDY terrorist organisation are not limited to what is described above. He has apparently been active in trying to forment [sic] international public opinion against the operations carried out by the government on the organisation"*. This statement is followed by some articles critical of Mr Tanir's activities in Washington, but once again, the indictment does not go any further and fails to demonstrate how the articles can be linked to any criminal behaviour.

*F: "News and Posts belonging to Ahmet Şık"*

81. The indictment focusses on an interview with Cemil Bayik, described in the indictment as *"ringleader"* of the PKK/KCK terrorist organisation, published on 14<sup>th</sup> March 2015. The indictment observes, *"... the use of the phrase 'guerrilla' in many places referring to the armed terrorist organisation PKK/KCK, aimed to ferment [sic] a perception among the public that the latter were pursuing a legitimate struggle"*, and that *"the interview was conducted as though with a legitimate armed power dealer rather than a terrorist ringleader and tried to instil this perception with the public"*. The result was that Ahmet Şık *"carried out propaganda for the group by presenting statements made by the armed terrorist organisation PKK/KCK's agenda to the public and thereby challenging the existing democratic legal order by trying to portray their final objective as the objective of any honourable person without mentioning the strategy embraced by the terrorist organisation or violent acts they had committed"*. This is entirely a subjective value judgment, even though the indictment presents it as a statement of fact.
82. The indictment deals with articles by Mr Şık covering the death of Mehmet Selim Kiraz, a prosecutor who was killed in the Istanbul Court of First Instance on 31<sup>st</sup>

March 2015. The indictment once again uses emotive language, concluding, *“the media announcing terrorism incidents to the public with such phrases as ‘This act was a method we were forced into’ to show the perpetrators as innocent people serves the objectives of terrorists and no democratic legal system will allow this”*. The indictment then cites *Leroy v France*<sup>19</sup>, recommending, *“the press should be required to use responsible language that does not degrade the memory of victims especially in terrorist attacks that cause social trauma”*. However, *Leroy v France* does throw light on how the articles constitute a criminal offence, and the indictment equally discloses no proper basis for such a conclusion.

83. The indictment refers to posts on Mr Şık’s Twitter account. These are characterised by the indictment as Mr Şık *“using posts on social media to present the state as a weak structure that terrorises the public and by these means misguided the public to create the setting the terrorists sought to achieve their final objective”*. Again, this appears to have no rational connection to the alleged charges or indeed to constitute a criminal offence.
84. The indictment addresses how one defendant can be accused of assisting multiple terrorist organisations with conflicting ideological agendas: *“when [terrorist organisations] take action based on a common perception of the enemy, this does not prevent them from acting with ideological and intent unity in the performative sense”*. In this case, *“their common goal is to wear down and destroy the Republic of Turkey and the Government”*. Therefore, *“any support provided to one of these terrorist organisations fortifies the same common focus”*. The indictment appears improperly to equate criticism of the government with support for a terrorist organisation.

***Section XI: Witness testimony describing the changes in publication policy and the process of eliminating former writers and other writers at the Cumhuriyet newspaper***

85. The statements of seventeen witnesses are summarised in the indictment. The topics in the statements cover the electoral practices in the Cumhuriyet Foundation Board of Directors and Advisory Board the resulting personnel changes; the sale of properties which were owned by the Cumhuriyet newspaper; comparisons between the headlines in the Cumhuriyet newspaper

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<sup>19</sup> App. no. 36109/03, (judgment 2 October 2008) (ECtHR).

and those connected to the FETO/PDY; connections between Fethullah Gulen and Cumhuriyet and general unhappiness with the direction of Cumhuriyet newspaper.

86. Many of the statements which are critical towards Cumhuriyet newspaper and the defendants come from former board members or former journalists who no longer have any association with the newspaper.
87. The fact that the date of the offence is set as "*The year 2016 and prior*" poses particular difficulty when dealing with these allegations as it is unclear whether the witnesses would have been in a position to witness first-hand the editorial decisions which are impugned by the indictment.
88. Much of the witness testimony concerning Fetullah Gulen appears to be hearsay. This is sometimes made clear from the indictment; at others, Mr Gulen's motives are presented as fact.
89. As with other parts of the indictment, this section also fails to set out how any of the witness statements amount to evidence of a crime being committed by the defendants, rather than mere criticism as to the running of the newspaper.

## ***Section XII: "Suspicious fund movements in the MASAK (Financial Crimes Investigation Board) reports"***

### ***A: Yeni Gun Haber Ajansi Basin ve Yayincilik A.S.***

90. The indictment looks at the accounts of Yeni Gun Haber Ajansi Basin ve Yayincilik A.S. It determines that there are transactions between this company and five other companies which are identified by the police as "*having connections to FETO/PDY*". Similarly, the indictment alleges there are three individuals who are respectively described as being "*connected to the TUSKON confederation*" / "*on the list of suspicious individuals in investigations*" / "*suspected of financing the FETO/PDY*" / with whom the company has had transactions.
91. The dates and the values of the transfers have been specified. Only initials have been provided for the individuals, making identification potentially difficult. However, the main issue is that there is nothing in the indictment which corroborates the allegation that these specific transfers constituted criminal conduct. Even where individuals and companies/organisations are guilty of financial crimes, it does not automatically lead to the conclusion that all transactions involving that individual / organisation constitute criminal

offending. Without further financial detail, merely listing these transactions falls far short of evidence capable of proving guilt.

92. Another allegation against Yeni Gun Haber Ajansi Basin ve Yayincilik A.S. is that it was sending “*money wires as salaries and ‘National Insurance Company Employees’ data*”, and that an individual called M.O. was working there between 17<sup>th</sup> June 2006 and 20<sup>th</sup> April 2008. The indictment records that M.O. was charged (with others) of aiding a terrorist organisation in an Assessment Report 2010.DR/77/1-1, dated 25<sup>th</sup> January 2010, for providing aid to the families of members of the KONGRA-GEL (PKK) terrorist organisation. The only evidence from this set of facts against Yeni Gun Haber Ajansi Basin ve Yayincilik A.S. appears to be that they hired M.O. before he was charged with an offence. How that has any bearing upon this indictment is not elaborated.

#### *B-H: Concerning individual defendants*

93. The allegations concern Can Dünder, Akın Atalay, Aydın Engin, Önder Çelik, Turhan Günay, Bülent Utku and Ahmet Kemal Aydogdu. Individual transactions with the date and value are listed. Similarly, to the allegations against Yeni Gun Haber Ajansi Basin ve Yayincilik A.S., the individuals referred to concerning transactions are identified only with initials which can create difficulties in identification.
94. However, the main issue is that it is unclear and unexplained how the following transactions referred to in the indictment can properly be regarded as proof of any crime committed by the defendants:
- a. A property transaction involving Can Dünder;
  - b. Akın Atalay transferring TL 2,500 to an individual whose son was involved in a company which belonged to S.A., who was involved in sending wires, EFTs and cash deposits after withdrawing funds from ATMs abroad;
  - c. Önder Çelik transferred TL 345.00 on 1<sup>st</sup> December 2011 from an individual employed between October 2006 and February 2009 by a company which was then “*investigated for making transfers to any organisations, foundations or institutions due to its being connected with to [sic] Fetullah Gulen Organisation*” in 2016;
  - d. Turhan Günay receiving TL 600.00 from an individual employed by a company which was alleged to have been “*carrying out efforts to*

*establish an Istanbul-based television channel run by the Terrorist Organisation PKK/KADEK”;*

- e. Bülent Utku having been employed prior to 14<sup>th</sup> December 2004 with an individual named E.D., who had sent a total of TL 66,000.00 to P.B., who was a partner and administrator of a news agency affiliated with the terrorist group KONGRA-GEL (PKK)’s KCK-TM; and
  - f. Mr Utku receiving TL 4,619.00 on 26<sup>th</sup> March 2013 from an individual called A.K.G, who began working as a judge in March 2014. A.K.G. had transferred TL 1,020.00 on 17<sup>th</sup> October 2014 to an individual called S.B., who was under surveillance due to claims they had cheated the exam to be a judge.
95. The indictment refers to Mr Utku being employed pre-December 2004 with E.D., who had sent money to P.B. No further information is provided about E.D. or P.B. The relevance of this is entirely unclear.
96. It is also unclear why it is relevant that Mr Utku apparently received TL 4,619.00 from A.K.G. Neither Mr Utku nor A.K.G. appear to be under suspicion, but S.B., to whom Mr Utku has no direct connection, is under investigation for a completely unrelated allegation.
97. Thus, the prosecution has once again neglected its obligation to explain how any of these transactions constitute an offence, in breach of Article 170(4).

### ***Section XIII: “Defence of the defendants”***

98. The “defences” of all Defendants save Can Dünder and İlhan Tanir have been summarised. No criticism is made for this, as it is explained that neither Mr Dünder nor Mr Tanir submitted defences as they had not been detained.
99. The summaries for Ahmet Kadri Gürsel, Akın Atalay, Bülent Utku and Ahmet Şık are very brief, essentially stating they do not accept any of the charges against them.
100. The other defendants deny any association between the Cumhuriyet newspaper and terrorist organisations. In addition, Günseli Özaltay, Hacı Musa Kart, Hakan Karasinir, Hikmet Aslan Çetinkaya and Mustafa Kemal Güngör add they were not in positions to influence the editorial content and / or had no control over financial matters at the Cumhuriyet newspaper.

101. Aydın Engin explains the phrase from the article *"Peace in the Country, Peace in the World"* is taken from Mustafa Kemal, and was not associated with Fethullah Gulen. Mr Karasinir, Mr Çetinkaya and Mehmet Orhan Erinç stated that news about "Fuat Avni" had been in all newspapers. Turhan Günay confirmed that no articles were written in favour of FETO/PDY between 2011 and 2013 when he was a Board member. Mr Erinç confirmed no donations were received from groups and companies associated with FETO/PDY or the PKK/KCK. He also explained the Cumhuriyet newspaper was experiencing financial difficulties, which was why the foundation board of directors had made the decision to sell some properties. Ahmet Kemal Aydogdu denied being the owner of the Twitter account "JeansBiri" as the accounts had been sold.
102. This section goes some way to address the requirements of Article 170(5) TCPC. However, it is unclear when the defences were provided to the prosecution and whether any further enquires were made to follow up on the Defendants' accounts. As such, the requirements have, again, not been adequately met.

#### **Section XIV: "Conclusion and assessment"**

103. It is worth being reminded of the prosecutor's obligation under Article 170(5) of the TCPC: "The conclusion section of the indictment shall include not only the issues that are unfavourable to the suspect, but also issues in his favour". The issues in the suspects favour are not summarised in this section in any way, in breach of 170(5).
104. The indictment repeats its assertions that after Can Dündar became the chief editor on 8<sup>th</sup> February 2015, the policy of the Cumhuriyet newspaper changed radically, with the newspaper becoming *"a press organ that served the objectives of FETO/PDY, PKK/KCK and DHKP/C armed terrorist organisations"* by spreading *"manipulative news"* and *"creating the image that the Government of Turkey and the President is 'a government and president that supports terrorism'"*.
105. The indictment asserts that all defendants on the Foundation Board of Directors are responsible for the change in publication policy as it was the Board who appointed Mr Dündar as the chief editor. This is said to be based on the ruling in *Surek v Turkey (No.3)*, Application No: 24735/94, 08/07/1999, where the property owner was found to have the right to shape the editorial work of a magazine, and therefore responsible, by proxy, for the duties and responsibilities of the magazine's editorial and correspondent staff, which was even more significant in times of conflict and tension.

106. The indictment insists, once again, that *“when terrorist organisations with different ideological approaches and bases act according to the perception of the common enemy it is known that this will not prevent them from acting within ideological and wilful unity in terms of actions”*. It is on this basis, the indictment proclaims the defendants can be rightly accused of helping more than one terrorist organisation, since they *“are tied by a higher force and their common goal is to wear down and destroy the Republic of Turkey State and Government”*. This cannot be an accurate position in law – a defendant must know which terrorist group they are accused of aligning with, and evidence must demonstrate this to the requisite criminal standard.
107. The indictment considers in conclusion the limitations to the freedom of the press and Article 17 ECHR<sup>20</sup>. The indictment identifies *“intentionally providing incorrect or incomplete information”* and *“displaying manipulative approaches”* when determining the limits of freedom of the press. It concludes, *“Freedom of the press should mediate on the side of the state to stay away from becoming tools in malicious intentions”*. The way the indictment suggests this should be done is expressed as follows: *“It is possible to see examples in history of states and governments that were first worn down under strong criticism and then overturned. Even if propaganda that targets the indivisibility of a country is concealed behind an innocent demand like freedom of expressions, [this] can be sustenance for terrorism”*. This suggests that no press freedom is countenanced by the Prosecutor and that press commentary in itself supports (any) terrorist acts.
108. This is the fundamental flaw in the prosecution presentation of the charges. The indictment does not appear to differentiate between legitimate criticism of a State and what it labels *“manipulative approaches”*, which it asserts are *“sustenance for terrorism”*. The indictment suggests that the *“defendants carried out press activities towards creating a perception in favour of the FETO/PDY terrorist organisation”*, assessing the articles, social media posts and headlines as *“not innocent and legitimate actions”, but “obvious that they served the objectives of the terrorist organisation”*. It is anything but obvious from the indictment how such journalism supported terrorism or terrorist organisations.
109. Article 170(2) of the TCPC states: “In cases where, at the end of the investigation phase, collected evidence constitutes sufficient suspicion that a

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<sup>20</sup> Article 17 ECHR: *Nothing in the Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.*

crime has been committed, the public prosecutor shall prepare an indictment". In this case, the indictment does not appear even to disclose any reasonable grounds to suspect that any of the defendants committed a crime, never mind sufficient suspicion.

## **Evaluation of the indictment in terms of international standards**

110. In addition to failing to comply with the Turkish Code for indictments, the indictment is also profoundly at odds with rights enshrined within the European Convention on Human Rights ("ECHR") and the International Covenant on Civil and Political Rights ("ICCPR") to which Turkey is a signatory.<sup>21</sup> What follows is necessarily only a summary of the international law principles which apply. More detailed exposition of these principles can be found set out in, for example, other BHRC reports which consider many of the same failings within the context of trials observed by BHRC.<sup>22</sup>

### ***Right to a fair trial***

111. The right to a fair trial is protected by Article 6 ECHR and Article 14 ICCPR.

112. A fundamental component of the right is for a defendant to know the nature of the case against them and to be able to challenge it. This includes the defence having the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party.<sup>23</sup> Without this fundamental starting point, the defendant is unlikely to be able to properly instruct their lawyer, obtain relevant evidence to support their defence or properly prepare for trial.<sup>24</sup> It is therefore highly likely that a fair trial will not be possible.

113. Moreover, General Comment 32 of the United Nations Human Rights Committee, dated 23 August 2017 (CCPR/C/GC/32) affirms at paragraph 31 that this right includes being provided with "both the law and the alleged general facts on which the charge is based."

114. In this case, the indictment has failed to link the evidence it relies upon with the offences it alleges that the Defendants committed. Likewise, the lack of clarity and coherence, and the failure of the indictment to disclose any real evidence other than unexplained theory is such as to render it incapable of proper

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<sup>21</sup> Turkey ratified the ECHR in 1954 and the ICCPR in 2003.

<sup>22</sup> See BHRC, Trial Observation Interim Report, Zaman Newspaper: Journalists on trial, June 2018, available at <http://www.barhumanrights.org.uk/wp-content/uploads/2018/07/Zaman-TRIAL-OBSERVATION-INTERIM-REPORT-FINAL-1-1.pdf>

<sup>23</sup> *Natunen v Finland*, App. no. 21022/04 (judgment 31st March 2009) (ECtHR); (2009) 49 EHRR 810, paragraph 39, citing *Rowe and Davis v UK*, App. no. 28901/95 (judgment 16th February 2000) (ECtHR); (2000) 30 EHRR 1 and cases therein.

<sup>24</sup> *Mattoccia v Italy*, App. no. 23969/94 (judgment 25<sup>th</sup> July 2000) (ECtHR), para 60.

objective analysis or response. As such, it violates Articles 6(3)(a) ECHR and Article 14(3)(a) ICCPR respectively.

115. Linked to the requirement that a defendant know the case against them is the presumption of innocence protected by Article 6(2) ECHR. The right requires that the burden of proof rest on the prosecution, in that it is for the prosecution to inform the accused of the case that will be made against them, so that they may prepare and present a defence accordingly. It is also the obligation of the prosecutor to adduce evidence sufficient to convict.<sup>25</sup>
116. The UN Guidelines on the Role of Prosecutors 199026 (“Guidelines”) further outline the duties of prosecutors in upholding the rule of law. Principle 12 requires prosecutors to perform their duties “fairly, consistently and expeditiously” in a way that upholds human rights and protects human dignity. Principle 13(a) requires prosecutors to carry out their functions impartially and without discrimination, and 13(b) requires prosecutors to “protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim, and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect”. The Guidelines are complemented and expanded upon by the UNODC and International Association of Prosecutors Guide.<sup>27</sup> The Guidelines add specificity to fundamental principles of international human rights law including the right to equality before the law, the presumption of innocence and the right to a fair and public hearing before an independent and impartial tribunal.
117. The lack of balance in the indictment, and with it the failure to consider any factors in favour of the defendants indicates that the Public Prosecutor has failed to objectively apply their duties to uphold international human rights standards. Much of the evidence advanced in the indictment in fact are *prima facie* legitimate actions, be they the publication of articles, social media posts or financial transactions, which have been deemed evidence of criminal activity with no further explanation. Thus, the indictment has completely disregarded the presumption of innocence, guaranteed by Article 6(2) ECHR.
118. Finally, a fundamental aspect of the right to a fair trial is to be heard by an independent and impartial tribunal. There is a clear risk of violation of this right given the overtly political tone of the indictment. The Defendants risk conviction for terrorism offences merely by disagreeing with the political views advanced in the indictment. There is a pattern of interference with judicial independence in Turkey with judges being arrested for alleged support and association with

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<sup>25</sup> *Barberà, Messegué and Jabardo v. Spain*, App. no. 10590/83, (judgment 6th December 1988) (ECtHR)

<sup>26</sup> Available at

<https://www.un.org/ruleoflaw/files/Guidelines%20on%20the%20Role%20of%20Prosecutors%20.pdf>

<sup>27</sup> UNODC and IAP, ‘The Status and Role of Prosecutors’, Vienna, 2014, available at [https://www.iap-association.org/getattachment/Resources-Documents/IAP-Standards-\(1\)/English.pdf.aspx](https://www.iap-association.org/getattachment/Resources-Documents/IAP-Standards-(1)/English.pdf.aspx)

terrorist groups.<sup>28</sup> The trial judges in this case may be at risk of being compromised as an acquittal may also be taken as dissent from the political perspective being asserted by the Public Prosecutor. As such, this could result in a tribunal being pressurised to convict a defendant out of fear of being persecuted themselves, as opposed to reaching a verdict of guilt after independent and objective consideration of the evidence before them.

### ***No punishment without law***

119. Article 7 ECHR and Article 15 ICCPR guarantee that no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time it was committed. In other words, *nullum crimen, nulla poena sine lege*: only the law can define a crime and prescribe a penalty.<sup>29</sup>
120. Furthermore, criminal law must not be extensively construed to the detriment of a defendant, it must be sufficiently clear and certain to enable a defendant what conduct is forbidden before he does it, and what act would make him liable.<sup>30</sup>
121. Legally downloading a publicly available messaging app is an instance where there is insufficient clarity and certainty about what actions constitute a crime. There is no law which forbids such an action, which is done by millions on a daily basis. By criminalising this behaviour, the indictment is in breach of Article 7 ECHR and Article 15 ICCPR.

### ***Freedom of expression***

122. The right to freedom of expression is enshrined in Article 10 ECHR and Article 19 ICCPR. It is a qualified right that in the pursuance of a legitimate aim can be limited. However, even where risks to national security are under consideration, restrictions must still be justified by relevant and sufficient reasons and respond to a pressing social need in a proportionate manner.<sup>31</sup> In this instance it is necessary to consider whether criminal charges founded almost entirely on press publications constitute that legitimate aim.
123. Contrary to the assertions made in the indictment, the ECtHR has consistently recognised the crucial role played by the press in a democratic society, and has

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<sup>28</sup> See Council of Europe Commissioner for Human Rights 'Country Report following visit to Turkey 1-5 July 2019', Strasbourg, 2020, available at <https://www.coe.int/en/web/commissioner/-/turkish-authorities-must-restore-judicial-independence-and-stop-targeting-and-silencing-human-rights-defenders>

<sup>29</sup> *Kokkinakis v Greece*, (1993) App. No. 14307/88 (judgment 25th May 1993) (ECtHR), at [52].

<sup>30</sup> *Ibid.*

<sup>31</sup> *Doner and Others v. Turkey*, App. no. 29994/02, (judgment 7th March 2017) (ECtHR), at [102].

found that authorities have only a limited margin of appreciation to decide whether a “pressing social need” exists to restrict this freedom:

*“Furthermore, there is little scope under Article 10(2) of the Convention for restrictions on political speech or on debate or questions of public interest. The most careful scrutiny ... is called for when ... the measures taken or sanctions imposed by the national authority are capable of discouraging the participation of the press in debates over matters of legitimate public concern.”*<sup>32</sup>

124. Moreover, the Court has observed that in a democratic society based on the rule of law, political ideas, challenging the existing order and advocated by peaceful means, must be afforded a proper opportunity of expression.<sup>33</sup>
125. When considering the need for interference by a national authority, due consideration is given to whether the expression in question is likely to exacerbate or justify violence. The Court will consider the following factors as a whole, not taking any in isolation<sup>34</sup>:
- a. Whether the statements were made against a tense political or social background;
  - b. Whether the statements, fairly construed and seen in their immediate or wider context, could be seen as a direct or indirect call for violence or as a justification of violence, hatred or intolerance.
  - c. The manner in which the statements were made, and their capacity – direct or indirect – to lead to harmful consequences.
126. In *Gozel and Ozer v. Turkey*,<sup>35</sup> the Court held that when striking a balance between competing interests, the national authorities must have sufficient regard to the public’s right to be informed of a different perspective on a conflict situation to that of one of the parties to the conflict, irrespective of how unpalatable that perspective may be for them.
127. In our view, the indictment neglects to appreciate, balance or consider the rights in the context of the evidence and allegations set out within it. The emphasis of the indictment is upon citing the limitations of freedom of expression, declaring, *“Freedom of the press should mediate on the side of the state to stay away from becoming tools in malicious intentions”*. The limited and self-serving analysis of

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<sup>32</sup> *Stoll v Switzerland* [GC], App. no. 69698/01, (judgment 10<sup>th</sup> December 2007) (ECtHR) at [106].

<sup>33</sup> *Egitim ve Bilim Emekcileri Sendikasi v. Turkey*, App. no. 20641/05, (judgment 25<sup>th</sup> December 2012) (ECtHR) at [70].

<sup>34</sup> *Perincek v. Switzerland*, [GC], App no. 27510/08, (judgment 15<sup>th</sup> October 2015) (ECtHR) at [205-208].

<sup>35</sup> *Gozel and Ozer v. Turkey*, App Nos. 43453/04 and 31098/05, §56, (judgment 6<sup>th</sup> July 2010) (ECtHR), at [56].

ECtHR authorities and the evident disregard the indictment displays towards the right to freedom of expression shows the depth of the problem.

128. The ECtHR has, in fact, as recently as on 10 November 2020 in *Suleyman and ors v. Turkey*,<sup>36</sup> determined the weight of the evidence in this indictment, in the course of an application from a number of the defendants in this case.<sup>37</sup> While the application primarily concerned whether the applicants' right to liberty in the context of pre-trial detention was violated, it considered the same material relied upon in this indictment.

129. Relevant to the analysis in this report, the ECtHR concluded that:

- a. The articles and messages constituted contributions by the journalists of Cumhuriyet to various public debates on matters of general interest [para 172];
- b. The articles and messages did not contain any incitement to commit terrorist offences, did not condone the use of violence and did not encourage insurrection against the legitimate authorities [para 173];
- c. The stance taken by the articles and messages was broadly one of opposition to the policies of the government of the day [para 174];
- d. Detailed examination of the applicants' alleged acts show they fell within the exercise of their freedom of expression and freedom of the press. There was nothing to indicate they were part of an overall plan pursuing an aim in breach of the legitimate restrictions imposed on those freedoms and were not capable of grounding a reasonable suspicion that the applicants had committed criminal offences [para 175].

130. Of particular relevance is the finding of the ECtHR in relation to the commentary published by Cumhuriyet:

*"... the judicial authorities concerned created confusion between, on the one hand, criticism of the government in the context of public debate and, on the other hand, the pretexts used by the terrorist organisations to justify their violent acts. They characterised criticism levelled legitimately at the authorities in the context of public debate, in accordance with freedom of expression and press freedom, as assisting terrorist organisations and/or disseminating propaganda in favour of those organisations.*

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<sup>36</sup> *Suleyman and ors v. Turkey*, App. no. 59453/10, (judgment 10<sup>th</sup> November 2020) (ECtHR).

<sup>37</sup> *Sabuncu and ors v. Turkey*, App. no. 23199/17, (judgment 10<sup>th</sup> November 2020) (ECtHR).

*In the Court's view, such an interpretation of the criminal law is not only difficult to reconcile with the domestic legislation recognising public freedoms, but also posed a considerable risk to the Convention system, resulting in any person expressing a view at odds with the views advocated by the government and the official authorities being characterised as a terrorist or a person assisting terrorists. Such a situation is incapable in a pluralist democracy of satisfying an objective observer of the existence of a reasonable suspicion against journalists who are aligned with the political opposition but do not promote the use of violence" [paras 178-179].*

131. The Court concluded that there had been a violation of Article 10 on the evidence presented:

*"It has not been demonstrated that that the evidence added to the case file after the applicants' arrest, in **particular the evidence in the bill of indictment** and the evidence produced while they were in detention, amounted to facts or information capable of giving rise to other suspicions justifying their continued detention.*

*In particular, the Court notes that the acts for which the applicants were held criminally responsible came within the scope of public debate on facts and events that were already known, that they amounted to the exercise of Convention freedoms, and that they did not support or advocate the use of violence in the political sphere or indicate any wish on the applicants' part to contribute to the illegal objectives of terrorist organisations, namely to use violence and terror for political ends" [paras 181, emphasis added].*

## Conclusions

132. This indictment is fundamentally flawed and fails to comply with international and domestic standards. In particular:
- a. It lacks concision and focus, does not fulfil the basic requirements for a legal document and amounts instead to a lengthy political thesis;
  - b. It violates Article 170(2) of the TCPC and Article 6(2) ECHR as there is a fundamental lack of evidence that the defendants committed a crime;
  - c. Further the indictment violates Article 170(4) of the TCPC and Article 6(3) ECHR as it fails to explain how the alleged “evidence” presented constitutes a crime under Turkish law;
  - d. Certain alleged conduct does not amount to an offence under national or international law (namely the use of a messaging application), in violation of Article 7 ECHR;
  - e. The political assertions in the indictment may jeopardise the fairness of proceedings by indicating that any defence to the charges or any acquittal on those charges would also support terrorist acts, thus violating Article 6(1) ECHR;
  - f. The indictment contravenes Article 10 ECHR by failing to recognise that the acts for which the applicants were held criminally responsible came within the scope of legitimate public debate and did not support or advocate the use of violence by terrorists.
133. A prosecutor’s duties when filing a public prosecution under Turkish and international human rights law are clear, as are the requirements for presenting a valid indictment. Prosecutors must adhere to their obligations to act objectively and in accordance with the rule of law. The failure to do so in this case amounts to a fundamental violation of the right to a fair trial and, as the ECtHR has recently confirmed, the right to freedom of expression.