

Legal report on indictment:

MIT News Trial

PEN Norway's Turkey Indictment Project

Şerife Ceren Uysal

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About the author

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

1: Subject of the analysis

This study consists of an analysis of the investigation document no. 2020/43545 and indictment no. 2020/3499, totalling fifty pages drafted on 23/04/2020 by Istanbul Public Prosecutor Yasin Erkal, Istanbul Deputy Chief Prosecutor Hasan Yılmaz and Istanbul Chief Public Prosecutor İrfan Fidan against suspects Aydın Keser, Barış Pehlivan, Barış Terkoğlu, E.E., Erk Acarer, Hülya Kılınç, Mehmet Ferhat Çelik and Murat Ağirel.

2: Findings on the investigation and prosecution stage

In February 2020, reports circulated that a person or persons connected to the National Intelligence Agency (MİT) was among those military personnel who had lost their lives in Libya. Following these reports, a criminal complaint was filed by MİT on 04.03.2020 citing the disclosure of the identity of the MİT employee. This was followed by the launch of a penal investigation against a number of journalists by Istanbul Chief Public Prosecutor's Office.

Hülya Kılınç was detained in Manisa on 04.03.2020, with her report posted on 03.03.2020 on the Odatv website cited as grounds for arrest. On the same date and within the same investigation, Odatv News Chief Barış Terkoğlu was also arrested in Istanbul. Both journalists were ordered to remain in custody by the examining bench on the same date. These events were followed by the blocking of access to the Odatv website by the Information and Communication Technologies Authority (ICTA).

Following Kılınç and Terkoğlu's detention, *Yeni Yaşam* Newspaper's Chief Editor Ferhat Çelik and Acting Chief Editor Aydın Keser, Odatv Executive Editor Barış Pehlivan and *Yeni Çağ* Newspaper columnist Murat Ağirel were arrested. Çelik, Ağirel and Keser were detained on March 8, while Pehlivan was arrested on March 6.

A written statement was made by Istanbul Chief Public Prosecutor's Office while the investigation continued containing the remark that: *"As part of the investigation into an 'attempt to expose National Intelligence Agency personnel thereby endangering the lives of their families and close acquaintances and undermining state intelligence activities', the detention of the suspects B.T, B.P, H.K, A.K, M.F.Ç and M.A was ordered pursuant to Article 100 et. seq. of the Code of Criminal Procedure and 27/3 first sentence of the MİT Law following examination by Istanbul Criminal Courts of the Peace no. 8, 4 and 5."*¹

It was also indicated in the same statement that the matter under investigation was, in common with the halting of the MİT trucks carried out on Jan. 1 and 19 2014, an intentional breach of Article 27 of the MİT Law, was committed with awareness of the law as part of a counterintelligence plan and an attempt to expose MİT personnel, endangering the lives of their families, close acquaintances and colleagues, while undermining state intelligence activities.²

The indictment drafted against the seven journalists – six while in detention – was accepted by Istanbul Court of High Crimes Court No 34 on May 7, 2020. The trial commenced on 24.06.2020.

At the conclusion of the first hearing, defendants Murat Ağırel, Hülya Kılınç and Barış Pehlivan were ordered to remain in custody. As for the released journalists, these were subjected to various judicial orders. The arrest warrant for Erk Acarer, whose statement could not be obtained, was also reordered.

Following the first hearing, the prosecutor was given time to offer a recommendation. The recommendation was submitted to the file a mere day before the second hearing. In sum, this stated that given the suspects had published, disseminated and disclosed the identification details of MİT personnel – and thereby that of their

¹ For the report in which the statement in question is included, see: <https://www.aa.com.tr/tr/turkiye/istanbul-cumhuriyet-bassavciligidan-sehit-mit-mensubu-sorusturmasina-iliskin-aciklama/1759280> (date accessed: 20.10.2020)

² Same cited report

families – while also distributing information on their duties and activities, punishment was sought, going on to state that had the offence allegedly committed proved successive, the enhanced penalty under Article 43 of the Turkish Criminal Code would be sought.

At the second hearing, on 09.09.2020, the statements in opposition to the recommendation and final defences were completed in the course of the same hearing, despite the recommendation only having been submitted to the file one day earlier. The trial was then brought to an end with the announcement of the verdict. As per the verdict:

- Aydın Keser, Ferhat Çelik and Murat Ağirel were sentenced to four years, eight months and seven days' imprisonment for the offence of "disclosure of information and documents relating to intelligence activities in a successive manner" pursuant to Article 27/3 of the MİT Law.
- Barış Pehlivan and Hülya Kılınç, in turn, were sentenced to three years and nine months' imprisonment for the offence of "disclosure of information and documents relating to intelligence activities" pursuant to Article 27/3 of the MİT Law.
- The remaining defendants were given full release as part of the verdict.
- The separation of the case against Erk Acarer, who had fled abroad, was ordered.
- Municipal employee E.E. was acquitted and the charge laid against E.E. was stated to be "not defined as a crime by law."
- Barış Terkoğlu was also acquitted on all charges, while the charge laid against Terkoğlu was stated to be "not defined as a crime by law."

A review of the appeal lodged against the verdict is pending as per the date the report was compiled.

3: Analysis of the indictment

A) Overview of the indictment:

The indictment (excluding the prosecution memorandum on the separated investigation) runs to fifty pages and involves eight suspects. All suspects stood charged of disclosing information deemed confidential in view of the state's security and political interests and exposing information and documents relating to intelligence activity as per Article 329/1 of the Turkish Criminal Code (TCC) and Article 27/3 first sentence of the Law on State Intelligence Services and the MİT Law.

The indictment starts out with a brief section touching on the (07.02.2012) events known publicly as the "MİT Crisis" and the incident in which MİT were halted in 2014. However, it is apparent when the indictment is taken as a whole that these sections have no bearing on the charges laid against either the suspects or the suspects' acts. There was no identifiable legal requirement for the inclusion of this section in the indictment.

Information is also here provided on the way the indictment has been laid out, which is as follows:

- 1) Description of the Event
- 2) MİT Directorate's Criminal Complaint
- 3) Acts of Disinformation Waged in the Investigation Process
- 4) Legal Assessment
- 5) The Alleged Acts

A detailed analysis of the text accompanying each of the intermediary headings reveals that a number of matters are broached that are not directly related to the investigation and a large number of long citations are made. This state-of-affairs seriously inhibits comprehensive reading of the indictment. For example, under the heading 'description of events', virtually two pages are devoted to a summary of the parliamentary resolution no. 1238 dated 02.01.2020 – known more commonly as the

“Libya Resolution.” The prosecution has probably referred to this resolution simply due to its providing the legal basis for the military and MiT personnel’s presence in Libya. However, it soon becomes clear that this consideration has no bearing on the charges laid against the suspects. The text of the second and third sections run to some four and a half pages. With the indictment prosecutors contenting themselves with briefly summarising the suspects’ defences or witness testimony, they have cited verbatim the two separate criminal complaints made by MiT, including the “conclusion and requested” sections. As for the third heading, this amounts to an intermediary heading that ought not to be included *per se* in the indictment. Not only are either events recounted in this section related to the subject-matter of the indictment, but the classification of events that are subject to other legal proceedings by the prosecutors as “disinformation” is problematic in its own right. The “interpretation” of events that do not directly originate from the acts attributed to the suspects, which are the subject of separate legal proceedings, is redolent of an effort to engender a negative perception of the suspects.

Since the sections “Legal Assessment” and “Alleged Acts” contain a more detailed discussion, they will be dealt with in later sections. However, there is a point that may be worth touching on here with reference to the latter section. Within the content of the indictment, the suspects’ alleged acts are initially set out under the first heading – namely, “Description of Event.” However, for each suspect, the same sentences have been penned again and again over the course of the fifty-page piece. This repetition has been made five times with reference to certain suspects (a double-entry has been made each time in the “Description of Event” alone). Hence, the fifty-page extent of the indictment creates an illusion. Certain indictments may of course exceed others in terms of length due to the complexity of the web of events or requirements in terms of juristic classification. However, the conclusion has been made that a text of no more than 10-15 pages could have emerged had the indictment been drafted in plain fashion, confining itself to all the prosecutors’ arguments, references and classifications (including the first four pages of this indictment containing the suspects’ names and identity information).

To simplify the analyses and findings made in the later stages of the report, the acts imputed against the suspects will be briefly summarised here:

Murat Ađırel (total of 6 paragraphs) is charged, in sum, with committing the act of disclosing confidential information, as the person who made the initial post concerning MİT personnel named S. C. and O.A. by identifying them as “case officers” in the tweet posted on 22.02.2020. There is also reference to the suspect having spoken on the phone to somebody from the Sputnik news agency on the same day.

Erk Acarer: (total of 3 paragraphs) is also charged, in sum, for tweets he posted on 22.02.2020 and it is stressed that he made these tweets at the same time as Ađırel.

Mehmet Ferhat ÇELİK and Aydın Keser (total of 2 paragraphs), in turn, are charged with exposing MİT personnel by, in this case, posting their photographs and identification details, as cited in reports published in the Yeni Yaşam newspaper and that daily’s website www.yeniyasamgazetesi1.com on 23.02.2020 and 24.02.2020 and upon the allegation that this information was published for the first time in the written press.

Hülya Kılınç (11 paragraphs), for her part, stood charged with publishing photographs secretly taken at a funeral and including certain details within the report concerning the deceased MİT member, of disclosing the identity of the MİT personnel in question and also exposing other MİT personnel in attendance at the funeral through photographs. It is also stressed that some of the photographs were published for the first time on the news site in question.

Meanwhile, E.E. was identified in these eleven as the person who took the photographs and sent them to Kılınç, though it is essentially not discernible what the charge is.

Barış Terkoğlu was charged by virtue of being the chief editor as part of the eleven paragraphs devoted to Hülya Kılınç.

Barış Pehlivan, conversely, in the same paragraphs, was charged after Pehlivan had been identified as being the chief editor of the relevant website.

In the middle of the section, in which the offences imputed against the suspects are summarised, the press statement made by parliamentarian Ümit Özdağ on 26.02.2020 has been cited verbatim and reference has then been made to the case report filed against him. However, the relevance of this section to the indictment has not been established, either. This speaks to an important shortcoming. If the indictment prosecutors are of the opinion that Özdağ exposed MİT personnel through this press statement, it is clear that under such circumstances, a section on the suspects should not find its way into this indictment, as the idea that Özdağ committed an act of breaching confidentiality becomes tantamount to saying that anyone who spoke of this same matter after the date in question could no longer objectively have committed the act of breaching confidentiality. This is the meaning of the word “disclosure” both in a linguistic and legal sense. The failure to draw a temporal and contextual connection between Özdağ's comments and the subject of the indictment invites discussion as to the requirement under Article 170 of the Code of Criminal Procedure that evidence favourable to the suspect also be taken into consideration. However, given that such consideration, neglected in this event, would by itself have prevented the charge from being laid, its importance must also be considered in these terms because the neglect of such considerations has given rise to a chain of serious legal violations – including the lodging of accusations against people who can no longer feasibly be suspected of the offence, the holding of these people in pre-trial detention and the inclusion of allegations against them.

Finally, the following finding with reference to the suspects in their entirety has been made by the prosecutors in the event description:

The suspects' acts do not in fact amount to the pedestrian act of reposting exposed information, but the act of lifting the lid on confidential information in a coordinated manner with designs on the National Intelligence Agency Directorate's activities and MIT personnel, the disclosure, publishing and dissemination of state information that ought to remain confidential in line with MIT's duties and activities, thereby endangering the lives of both MIT personnel and their families through exposure of their identities, duties and assignments.

Nowhere in the indictment is there an explanation of the detail that removes the journalists' actions from the realm of that deemed "pedestrian." Similarly, it is also totally unfathomable from the indictment as to what underpins the allegation of the act being planned and coordinated. It is clear that a journalist speaking on the phone to the editor-in-chief of the newspaper they work for is a necessity born of their professional duties. Likewise, the posting of a tweet on a similar subject on similar dates by two unrelated people is initially suggestive of coincidence. Here, the presence of tweets posted within a certain timeframe and merely having the same subject manifestly does not give rise to an adequate suspicion of the existence of a coordinated, planned activity. Over and above these points, what both offences mentioned in the indictment actually entail is the disclosure of information, but whether or not this is a planned and coordinated action is of no importance as far as the statutory provisions cited in the indictment are concerned. The paragraph in question cited above is featured verbatim twice in the indictment (page 15 and page 22). It is also stated on page seven of the indictment that the act was committed "as part of a plan and in a systematic and coordinated manner." The repeated raising in this idea is of absolutely no importance as to the classification of the offence imputed and given no worthwhile effort has been made in the indictment to produce evidentiary support for this, it strengthens the impression that effort has been made to foster a negative perception of the suspects.

B) Can both Article 329/1 of the TCC and Article 27/3 of the MIT Law be invoked with respect to the suspects' acts?

As has been stated above, each suspect has been charged with violating the articles of two laws with a single action. The articles in question are:

Article 329/1 of the TCC: One who discloses information deemed confidential in view of the state's security or domestic or foreign interests shall be sentenced to a term of imprisonment of between five to ten years.

Article 27/3 of the MIT Law: In the event of the publishing, dissemination or disclosure of such information and documents outlined in the first and second paragraphs via radio, television, the internet, social media, newspapers, magazines, books and all manner of written, visual, audio and electronic mass media, those held responsible as per Article 11 of the Press Law no. 5187 of 9/6/2004 and Articles 4 and 6 of the Law on Regulating Publications made Online and Combatting Crimes Committed by means of such Publications no. 5651 of 4/5/2007 and those who disseminate them shall be sentenced to a term of imprisonment of between three and nine years.

The first two paragraphs of the same article to which reference is made in Article 27/3 of the MIT Law govern the offence of disclosing information or documents relating to MIT's duties and activities or disclosing information or documents relating to the identity of MIT personnel or their families. Hence, provision is essentially made through the third paragraph for situations in which the acts regulated in Article 27/1 and 2 of the MIT Law have been committed via mass communications media such as radio, television or newspapers.

Upon examination of Article 4 of the MIT Law regulating the duties of the intelligence agency, it can be seen that everything pertaining to the institution is essentially deemed to be objectively related to the state's security. As such, when Article 329/1

of the TCC and Article 27/3 of the MİT Law are considered in conjunction, the nature of the disclosed information and documents does not appear to vary. Given the variance of the media (and perhaps method) of the disclosure, it can be argued that Article 27/3 of the MİT Law is a specific norm that regulates a qualified version of an offence for which a general provision is made.

If one concedes that Article 27/3 of the MİT Law is a specific norm and that Article 329/1 of the TCC is a general norm, then one must concede that there is no legal basis for the simultaneous invocation of both with respect to each of the suspects' individual actions. Moreover, given that the norm that must be applied here is the specific norm, it is beyond dispute that Article 27/3 of the MİT Law must be invoked. It is contrary to the law for both a general and specific norm to be invoked separately in the charges.

To elaborate a little further, a specific norm possesses further properties and elements as opposed to the properties of the general norm that characterise it as a specific norm³. It is clear that, in the case at hand, this specific element is the disclosure of information relating to MİT personnel or their families under Article 27/2 of the MİT Law. Kayhan İçel, in his article published in the Istanbul Bar Association Journal, has starkly set out the legal consequences of an implementation contrary to this procedure:

(...) there is absolutely no possibility of applying general norms containing similar elements to the act falling under the ambit of the specific norm. (İÇEL, Concurrence of Offences, p. 187). Since to think otherwise would amount to the formation of offences by analogy, this would constitute a blatant breach of the principle of legality⁴

³ İcel, Kayhan, Implementations that do not Accord with the Legal Character and Properties of the General-Specific Norm Relationship in Penal Law, Istanbul Bar Association Journal, September-October 2015, pp. 15-30, Istanbul, <https://www.istanbulbarosu.org.tr/files/Yayinlar/Dergi/doc/ibd20155.pdf>

⁴ Op. cit., p.18

It is also clear that the charges invoking both a general and specific norm are in contradiction to Article 170/3-h of the Code of Criminal Procedure. According to the provision in question, every indictment must contain the imputed offence and statutory articles whose implementation is warranted. This does not mean the prosecutor randomly assembling statutory articles, but compiling an indictment by “determining” the statutory articles related to the imputed offence.

It would be beneficial to refer once more to the Istanbul Chief Public Prosecutor’s Office’s statement from 09.03.2020 referred to in the section on the findings on the investigation and the prosecution stage. The Chief Prosecutor’s allegations are stipulated in the statement in question to invoke Article 27 of the MIT Law. As such, it can be said that the prosecution has been aware from the outset of the existence of a specific norm and the need for the investigation to be conducted within the scope of this norm.

It is crucial to grasp that this discussion on the relationship between specific norms and general norms is not a discussion that lies purely to the realm of theory. An examination of the judgement passed at the trial held subsequent to this indictment shows that judgement was passed on the defendants, who were sentenced under Article 27/3 of the MIT Law, while the defendants were acquitted with reference to Article 329/1 of the TCC. Had legal classifications been made correctly in the indictment, the trial would not have been heard before the criminal court in the first place. As such, this point – that was ignored by the prosecutors – has clearly entailed a whole host of other illegalities.

C) Can previously disclosed information be ‘re-disclosed?’

An analysis of this intermediary heading will be conducted with reference to both offences, one of which is a general norm and the other of which refers to the disclosure of information regulated under the confidentiality law. For starters, the existence of confidential information must be proven for the commission of this offence to be possible. Subsequently, the information that is confidential must be

disclosed. The offence only takes place with the disclosure of the relevant information. Thus, the act in question here is not just “disclosure,” but the “disclosure of information that is confidential.”

Consequently, there exists two prior questions that must be posed before drafting the indictment: 1) Does the act involve information whose disclosure is an offence pursuant to any statutory regulation? and 2) If so, who disclosed this information?

The indictment replies with a resounding “yes” to the first question. However, in my opinion, the answer to this question is not so clear. When the question is formulated as: “Is it an offence to disclose MIT agents’ identities?” the reply “yes” can quickly be given. However, if this question is asked within an indictment, then there is an absolute need to make an analysis in terms of the event at hand. For example, within the indictment, four persons, three of them journalists, have been included in the investigation in relation to photographs taken at a funeral and a related report. However, the indictment is silent as to exactly what “undisclosed” information was disclosed as the result of the taking of images at an event that was open to the public – and to which the MIT institution in fact sent wreaths – and the reporting of this funeral. It must immediately be noted at this juncture that neither the TCC nor the MIT Law has stipulated a quantitative criterion with reference to disclosure in defining the offence. As such, the legislator has not differentiated between speaking of the information whose disclosure is forbidden on the phone and presenting it at a lecture. Hence, the question of whether the taking of images at a funeral open to the public can be treated, as such, as a criminal act must be answered convincingly by the prosecution, as – in this case – the existence of protected information can no longer be spoken of. It must be considered the prosecutor’s duty to prove the contrary pursuant to Article 170/4 of the Code of Criminal Procedure.

Turning to the second question, if protected information does exist, both norms by their nature demand an investigation into who this information was disclosed regarding, as – as is also apparent from the dictionary definition – information that has already been disclosed cannot be re-disclosed! This point is one of basic

importance as far as the indictment is concerned. The indictment prosecutors have, in fact, continually circled this point throughout the fifty-page text.

For example, on page 23 of the indictment, under the heading “Legal Assessment,” the prosecutors have had to make two important citations. One of these citations is the observation, “Things known to all cannot be subject to confidentiality,” as contained in judgement number 1987/762-747 of Chamber 2 of the Military Court of Cassation. The second, conversely, is the pronouncement contained in the European Court of Human Rights Sunday Times/United Kingdom Ruling of 26/11/1991, i.e. “As confidentiality is a realm that is closed to others and not made public, the maintenance of whose secrecy is deemed beneficial, information that has now lost its confidential nature and has come into the public domain cannot be treated as being confidential.” If the stressed criteria in the judgements cited here had been applied, the offence would clearly have been devoid of subject matter with no trial warranted as far as a section of the suspects were concerned. An examination conducted purely into the dates without addressing the merits would palpably have produced this conclusion.

Even though these citations were made by the indictment prosecutors, two separate interpretations were adopted in the indictment that are at odds with these citations on disclosure and the notion itself. Both interpretations will be discussed through the notes below. But it must be noted that the issue here is not the prosecutors engaging in interpretation, but their embarking on the endeavour of alleging a crime through their interpretation.

i) The stress on “first time / initially” laid in the indictment:

In describing the suspects’ acts, repetition is made of the expressions “first time” or “initially” a full 36 times. A number of the suspects are accused of revealing information “for the first time” on social media that military personnel who lost their lives in Libya were MIT personnel, while another section talks of posting funeral photographs on the internet for the “first time”, and other parts of the text highlight the suspects having published similar information in the written press for the “first

time". A chink has thereby been opened for "disclosure" to be debated anew in a legal sense. Instead of testing whether the "information" featured in the report or tweet had previously been disclosed – that is "whether it had lost its confidentiality" – the indictment has set out to test "whether this information had previously been published on a specified platform [newspaper, website, twitter, etc.]" However, the legal interest whose protection is sought by means of this type of offence is clearly above all "the preservation of the confidentiality of the information whose confidentiality statutory provision has been made for." With reference to this same context:

(...) It is not possible due to the nature of the act for the act of disclosing the identities of MIT personnel and their families and their posts, duties and activities to have been committed successively because, once the act of disclosure has been committed once, this means there no longer remains any matter to be disclosed, which is a requirement for the act to be committed for a second time⁵.

ii) The wording "even if disclosed it is an offence" contained in the indictment

As has been discussed in detail above, the meaning of the notion of "disclosure" and the fact that the passing of information that has been disclosed does not constitute an offence are of basic importance for this indictment. The need arises at this very point to briefly touch on a paragraph contained in the indictment

The following comments are made on page 2 of the indictment:

(...) It was ruled in the content of the decision of the Constitutional Court number 2014/122 E. 2015/123 K. of 30.12.2015, and promulgated in edition 29640 of the Official Gazette dated 01.03.2016 with respect to the annulment action brought against the Law on

⁵ Cetin, Soner Hamza, The Commission of Offences Through Information and Documents Relating to MIT's Duties and Activities and the Offence of Fraud Committed Through the Disclosure of MIT Personnel's Identities and their Identities (27/1 and 2 of Law number 2937), Izmir Bar Association Journal, May 2020, pp. 65-116, <https://www.izmirbarosu.org.tr/pdfdosya/mit-in-gorev-ve202092810323752.pdf>

Amending the Law on State Intelligence Services and the National Intelligence Agency no. 6532 of 17.04.2014, "This matter as is laid down in the third paragraph that is at issue of the same article was examined under a separate heading and the provision for a separate offence of publishing, disseminating or disclosing activities arising under the National Intelligence Agency's Duties and Powers and information relating to its assigned personnel, even if disclosed, is not unconstitutional.

Special importance ought to be attached to the Constitutional Court ruling cited in the indictment. As will be seen in the above citation, the sense is created by placing inverted commas before part of the paragraph [highlighted in yellow by me] that a citation is being made, but these inverted commas are not subsequently closed. It is thus in the first place incomprehensible as to which part of the text is citation and which part, conversely, is the indictment prosecutors' interpretation or analysis. Under circumstances in which the impression is created that a Constitutional Court ruling is cited here, this matter clearly cannot be brushed off as a simple punctuation error, because it is known to all who have graduated from law faculty that in legal texts, even a single word or conjunction has an importance that alters the outcome.

The expression "even if these have been disclosed" finds inclusion in the sentence apparently cited verbatim from the ruling, as per the impression created in the wording of the indictment. In this manner, the impression has been created that the Constitutional Court has declared the use of information whose disclosure has been forbidden to also constitute a crime following disclosure. However, on examination of the said Constitutional Court ruling, it has been determined definitively that the expression "even if these have been disclosed" formatted in bold type in the text of the indictment is not included. This expression was neither included by the Constitutional Court, nor is there any indirect or direct discussion in the ruling that

would lead to this conclusion⁶. In this context, trust in the indictment has been seriously impaired with a manner of punctuation and discussion chosen by the indictment prosecutors that presents their own interpretations as to the content of a Constitutional Court decision.

D) Legal violations resulting from neglected juristic classification in the indictment:

Even if discussion of the allegations underpinning the whole indictment is left to one side, one can encounter problems in the indictment arising from the absence of juristic classification. An important example that warrants discussion in this regard is the standing of Barış Terkoğlu, who is included as a suspect. In an investigation in which seven of the suspects are journalists, it is clear that legal responsibility must be argued absolutely. However, no such argument has been embarked on in the indictment. Had such a test been performed, the indictment prosecutors would have had to examine the Press Law and the Law on Regulating Publications made Online and Combatting Crimes Committed by means of such Publications no. 5651 (Internet Law). Most crucially, had this examination been made by the prosecutors, there would have been a clear perception that the present indictment could have been drafted with reference, not to eight people, but just seven. For, while the Odatv website is a news site, it would have been determined to be subject, not to the Press Law, but the Internet Law. The expression “responsible manager” does not appear in the statute in question and responsibility for publications falls to “content providers” – along with the author – or the former, if the author is anonymous. Having determined the content provider to be Barış Pehlivan, no charges could have been laid against Barış Terkoğlu, who is alleged to be responsible for content that is not his. This means that Terkoğlu was tried despite bearing no responsibility in legal terms and, moreover, was held in lengthy detention under pandemic conditions. As such, this case has been marked by the “neglect” in the indictment of one of the

⁶ The Constitutional Court’s decision number 2014/122 E. 2015/123 K. of 30.12.2015. The decision can be examined at the link below: <http://kararlaryeni.anayasa.gov.tr/Karar/Content/004ab030-da02-462b-9990-84cad78525c9?excludeGerekce=False&wordsOnly=False>

juristic tests of most crucial importance for identifying suspects, giving rise to numerous rights violations. As concerns the indictment, this point may be deemed indicative of a breach of Article 170/5 of the Code of Criminal Procedure, because express provision is made under the article that not only matters detrimental to the suspect, but also matters favourable to them, must be presented. However, I am of the view that the issue here is of a nature that goes beyond a breach of Article 170/5 of the Code of Criminal Procedure. The assigning of suspect status to a person whose non-suspect status in this investigation would clearly have been established through a simple juristic classification has also caused serial violations including – when the length of pre-trial detention is taken into consideration – a breach of the presumption of innocence.

4: Is the object of scrutiny truly an indictment in a legal sense?

Finally, Paragraph 2 of Article 170 of the Code of Criminal Procedure warrants consideration with reference to all the above analysis of this indictment. Under the provision in question, the existence of “adequate suspicion” is a requirement for the bringing of public cases. Articulation is given in this provision to the precept, “the relationship between suspicion of guilt and the notion of evidence has been emphasised and suspicion that a crime has been committed must be supported by evidence.” Indeed, “Adequate suspicion can be spoken of if, in view of the available evidence, the probability of the defendant’s conviction in a potential trial is greater than that of his or her acquittal.”⁷ As has been discussed in detail above, the present indictment cannot be said to adhere to Article 170/2 of the Code of Criminal Procedure.

⁷ Nur Centel/Hamide Zafer, Penal Procedure Law, Beta Publishing House, 2008, p.441

By way of summary of the entire analysis, it has been concluded that the prosecution has, through its acts and omissions, failed to act in adherence to Article 170/2 of the Code of Criminal Procedure. Viz:

- Consideration has not been devoted by the prosecution, with a single act being involved, to the existence of two separate provisions, one specific and one general, applicable to this act and the need for the specific provision to be applied in the instance at hand.
- Due to the incorrect performance or non-performance by the prosecution of juristic classification regarding the Odatv website at which Barış Terkoğlu worked, he was nominated as a suspect in the indictment despite the absence of a legal basis for his being charged in this indictment.
- An expansionary interpretation essentially contrary to the elements typifying the offence under both the general and specific provision through the repeated use of the expression “even if disclosed” has been adopted and an offence has more or less been created by the prosecution.
- It defies comprehension as to what the offence E.E. stands charged with from the total content of the indictment and, despite no charge having been lodged against E.E, the impression has been formed that E.E. has been nominated as a suspect in the indictment.
- Finally, the matters as to whether “the information had previously been disclosed” or whether “the information was information that ought to be confidential,” the two most crucial juristic tests with regard to this type of offence were not subject to qualitative examination. On the contrary, the prosecution initially adopted an expansionary interpretation with resort to the phrase “even if disclosed” and subsequently neglected to entertain a whole host of basic facts, such as the funeral upon which reporting provided the crucial basis for the entirety of the Odatv suspects being held, which was – anyway – open to the public.

In the context of international law, it is worth recalling the United Nations Guidelines on the Role of Prosecutors. According to these guidelines, prosecutors “shall perform an active role in criminal proceedings, including institution of prosecution and, where authorised by law or consistent with local practice, in the investigation of crime, supervision over the legality of these investigations.”⁸ It will be noted that supervision over the legality of investigations has been stipulated to be the prosecutors’ judicial role and duty. As such, the prosecutor must be considered directly responsible for the legality of an indictment and the legality of the evidence cited within.

It is stated in Article 12 of the same guidelines that “Prosecutors shall, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system.”

Unfortunately, the findings set out one-by-one above indicate that the precise opposite of these requirements has been performed.

Rather than make a detailed analysis according to the European Convention of Human Rights (ECHR), it will simply be pointed out that the indictment in question manifestly violates a number of articles of the ECHR. Heading the list of such violations is the right to a fair trial as governed under Article 6 of the ECHR. However, the taking of action in a manner that cements the violation of Article 6 in breach of the no-unjust-punishment principle provided for in Article 7 of the ECHR – the action of expanding the offence through interpretation – is a distinguishing feature of this indictment. Additionally, it merits underlining that Barış Terkoğlu’s right to Liberty and Security governed under Article 5 of the ECHR has also been violated.

By virtue of satisfying a number of elements of Article 170/3 of the Code of Criminal Procedure, adopting a system of intermediary headings and including the two distinct headings of “Alleged Acts” and “Legal Assessment,” the indictment can be said in formal terms to rank positively above the average for indictments in Turkey.

⁸ European Court of Human Rights. Ecer and Zeyrek / Türkiye, Application no: 29295/95 and 29363/95, paras. 32-37, 27.02.2001

However, as described above, the effort expended to expand a typified offence through interpretation or to create a new offence backed up by a false citation made from a Constitutional Court ruling places the legality of the indictment in question as a whole.

As has been determined in virtually all the reports issued up-until now, in the case of this indictment, too, accusatory comments concerning this investigation and the suspects' acts were ascertained to have been made by executive-level politicians before the indictment had even been drafted.⁹ The encountering of a similar phenomenon as in virtually all the scrutinised indictments begs investigation as to whether this demeanour by the executive branch has been made into a vehicle for bringing decisive pressure to bear on prosecutors as a component of the judiciary in determining the content of the aforementioned indictments.

Sadly, a portion of the deficiencies identified in this report relate to the most basic legal principles and, as has been stressed in the report, as much as the errors that were made, the omissions of what has been required have further compounded the injustice faced.

In this regard, the emphases in verdict no. 2011/17629 E and 6976 K. dated 30/11/2011 of Penal Chamber no. 13 of the Court of Cassation are of significance:

Pursuant to the "People's Right Against Self-Incrimination" and "Exhaustive Investigation and Single-Session Hearings" principles adopted in the New Turkish Penal Justice System, Public Prosecutors conducting investigations must gather all evidence within a reasonable time, and simply bring into issue the points they consider will result in

⁹ For Süleyman Soylu's statements: <https://tr.sputniknews.com/turkiye/202003051041535344-soyludan-odatyve-devlet-sirri-denilen-bir-sey-var-dir-hadi-bu-haberi-almanyada-yapsinlar/>

conviction and not bring into issue acts they consider to result in acquittal, which is perform a kind of filtering duty¹⁰.

What has been concluded in this examination, conversely, is not the effort to perform a filtering duty but, on the contrary, a tendency to put oneself in the position of the legislator. In conjunction with this, despite the absence of a provision attributing unlawfulness to a portion of the suspects' actions and that this matter be determinable from a simple analysis, the ignoring of these phenomena can be accounted for either by defective legal knowledge or the strong desire on the part of the prosecutors for the suspects to be punished notwithstanding the statutory provisions. Either situation is manifestly unlawful.

Finally, it is worth recalling the following observations contained in verdict no. 2015/15916 E and 2016/765 K. dated 20.01.2016 of Penal Chamber no. 12 of the Court of Cassation:

(...) An indictment drafted without gathering evidence and without relating the evidence to the act imputed to the suspect (or to the suspect) breaches the suspect's right to a fair trial (right against self-incrimination). The right to a fair trial is most certainly not a right purely related to the prosecution stage.

Not bringing a case (drafting an indictment) that is unjust must be the concern that most befits a Public Prosecutor's duties. An unjust or unwarranted indictment drafted against the suspect is the violation of a personal right. The unjust assigning of defendant status to a person and condemning them to a trial process that can sometimes perhaps last years is a psychological trauma¹¹.

¹⁰ Judgement number 2011/17629 E. and 6976 K. dated 30/11/2011 of Penal Chamber No 13 of the Court of Cassation

¹¹ Judgement number 2015/15916 E and 2016/765 K. dated 20/01/2016 of Penal Chamber No 12 of the Court of Cassation

The last citation made from the Court of Cassation verdict may serve as a summary of the analysis of the indictment in question. Not bringing up unjust cases – that is, not issuing needless indictments – should indeed be paramount alongside the basic concerns of a Public Prosecutor.

The most basic proposal that suggests itself, given the analysis of this indictment, is for the said indictment to be open to discussion at the educational level of law faculties as an example as to “how an indictment should not be drafted” because, due to the deficiencies that have been discussed in detail above, it does not even satisfy the minimum criteria expected of such a document.