

PEN  
NORWAY

# Guidelines on Indictment Writing for Prosecutors in Turkey



This booklet is produced by PEN Norway.

©PEN Norway, December 2023

PEN Norway is a non-governmental organisation dedicated to promoting and protecting freedom of expression worldwide. At the core of PEN Norway's work is the support to imprisoned and at-risk writers, journalists, and artists. PEN Norway was founded in 1922 in Oslo, and is a part of PEN International, the world's largest organisation for writers and freedom of expression.

PEN Norway has monitored the trials of journalists, writers, and civil society activists in Turkey for over 40 years, focusing on cases related to freedom of expression. PEN Norway have closely monitored the Gezi Park hearing, as well as a range of other hearings involving journalists and members of civil society as part of their freedom of expression-related human rights work on Turkey. As a part of PEN Norway's Turkey Indictment Project, PEN Norway has worked with lawyers and judge's worldwide to study indictments in freedom of expression cases, including both the Gezi Park trial and the case against Kavala and Barkey.

***PEN Norway***

**Email:** [pen@norskpen.no](mailto:pen@norskpen.no)

**Web:** [www.norskpen.no](http://www.norskpen.no)

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

## **Guidelines on Indictment Writing for Prosecutors in Turkey**

|   |           |
|---|-----------|
| <b>Table of Contents</b>  |           |
| <b>Introduction</b> .....   | <b>5</b>  |
| <b>A- Guidelines on indictment writing for prosecutors in Turkey</b> .....  | <b>9</b>  |
| <b>B- The role of prosecutors in criminal investigations and the principles of the prosecution profession</b> ..... | <b>11</b> |
| B-1: The role of prosecutors in criminal investigation according to the Code of Criminal Procedure: .....           | 11        |
| B-2: UN Guidelines on the Role of Prosecutors: .....  | 12        |
| B-3: European Guidelines on Ethics and Conduct for Public Prosecutors .....   | 14        |
| B-4: Constitutional and ECHR provisions related to the duties of prosecutors .....                                  | 15        |
| B-5: Criteria required for a valid indictment as prescribed by the Code of Criminal Procedure: .....                | 20        |
| <b>C- Indictments in Turkey in the light of the relevant legislation and adopted principles</b> .....               | <b>23</b> |
| C-1: Omission of legally required elements in indictments   | 23        |
| C-2: Failure to provide sufficient detail regarding the offensive action in the indictment: .....                   | 25        |
| C-3: Omission of exculpatory evidence in indictments: ....  | 29        |
| C-4: A common emphasis of all principles and legal regulations: Expeditiousness .....                               | 30        |
| C-5: The indictments' treatment of the "Presumption of Innocence": .....  | 32        |
| C-6: The indictments' treatment of the "Freedom of Expression" .....  | 33        |
| C-7: The prosecutor's obligation to be impartial: .....   | 35        |
| C-8: Other issues of concern .....  | 36        |
| <b>D- Recommendations for drafting indictments that do not violate rights and freedoms</b> : .....                  | <b>40</b> |
| <b>E-Conclusion</b> .....   | <b>42</b> |
| Annex: List of indictments analysed within the scope of the study .....   | 43        |

## Introduction

Following the attempted-coup in Turkey in 2016, the government implemented a state of emergency that it upheld for two years. This is despite the Venice Commission's opinion in its October 2017 report that the threat to national security lasted only 48 hours. During the two-year period 2016-2018 the government issued tens of 'Emergency Decrees' by which means they shuttered 178 media organisations<sup>1</sup>, and all but four opposition newspapers, jailing hundreds of journalists. In 2018, the number of journalists in prison reached a record 110 according to the report published by European Commission.<sup>2</sup> By 3 May 2019, World Press Freedom Day, some sources reported that the number of imprisoned journalists in Turkey had reached 191. With this number, Turkey became the country with the highest number of imprisoned journalists in the world.<sup>3</sup> Sadly, the situation for Turkey's journalists in terms of freedom of expression and the right to a fair trial has not improved since then, with Turkey being placed top of the list of countries from which individuals applied for their cases concerning potential violations to their right to freedom of expression to be heard at the European Court of Human Rights in 2021.<sup>4</sup>

Events in Turkey during the latter half of 2016 prompted grave concerns regarding the rule of law, the right to fair trial and freedoms closely tied to these rights – the freedoms of opinion, expression, and press freedom in general. PEN Norway monitored

over 100 hearings against journalists, civil society actors and media workers between 2016 and 2023. These included the high-profile media trials such as the Cumhuriyet newspaper trial, the Gezi Park trial in which 16 defendants were held responsible for 2013's impromptu uprising against government conservatism and the fight to preserve a green space at Taksim square, Istanbul. As well as this, PEN Norway monitored individual journalist trials month by month, observations which led to the conclusion that the indictments underlying these trials warranted a scientific and comprehensive review. PEN Norway therefore set up the 'Turkey Indictment Project' in January 2020. The detailed legal analyses that was conducted of indictments in trials concerning violations of the defendants' right to freedom of expression found the allegations in many of these trials to be unclear, with no established link between the presented evidence and alleged actions. What is more, when considering all the arguments put forth in the hearings, even those trial observers without legal expertise felt they could clearly see that no criminal offense had been committed.

PEN Norway's Turkey Indictment Project examines indictments that targets a broad range of individuals, including journalists, civil society activists, filmmakers, academics, and lawyers, raising questions about potential violations of the right to freedom of expression. The project and first annual report presenting 12 indictment studies and six articles on various mechanisms of the law in Turkey was launched at an online event with international participants on 30 September 2020 and is still ongoing today.

Based on a scientific methodology of legal assessment, the project aimed to address whether the indictments – a cornerstone of the criminal process – drafted by prosecutors in Turkey, aligned legally with the existing Code of Criminal Procedure (CCP) in force in Turkey and with other pertinent international legislation, particularly the European Convention on Human Rights (ECHR), of which Turkey has been a signatory since 1953 and whose regulations and rulings supercede all of the same in Turkey.

Indictments in 12 individual cases were studied in 2020, ten in 2021, three in 2022 and four in 2023. In total, 29 indictments have

so far been assessed by lawyers, judges and legal academics from Norway, Austria, United Kingdom, Netherlands, Italy, Turkey.<sup>5</sup> Those assessments culminated in legal analysis reports prepared for each indictment. Another dedicated study on the Gezi Park trial was conducted, beginning with the indictment of the file and spanning the appeals process, which was subsequently published as a book. Meanwhile, as a core component of the Turkey Indictment Project, we continued our practice of participating in hearings pertaining to freedom of expression as independent observers. As part of our ongoing work on freedom of expression, the right to fair trial, and judicial independence in Turkey, numerous articles have been authored. In summary, the forthcoming guidelines presented here can be seen as the concluding chapter of a scientific and legal study into violations of the rights of journalists and other citizens of Turkey by an overzealous, anti-dissident judicial mechanism supported and potentially directed by the government at the highest levels.

The Turkey Indictment Project has consistently uncovered a regrettable pattern: Situated at the core of proceedings directly tied to freedom of expression in Turkey, are indictments riddled with numerous errors and omissions. The study paints a deeply concerning picture, indicating violations of many fundamental rights and freedoms such as the presumption of innocence, the right to defence, and the right to fair trial, occurring even at the very early stage of indictment-drafting. The analysis also discovered fundamental contradictions between the indictments and principles outlined in internationally recognized foundational texts published to guide and regulate prosecutors.

Given these reasons, PEN Norway deemed it beneficial to develop guidelines based on the role of prosecutors in the criminal justice system in Turkey and the universally acknowledged ethical rules of the prosecutor's profession. PEN Norway's Guidelines on Indictment Writing for Prosecutors in Turkey will serve to improve the indictment-drafting process in Turkey, particularly in connection with cases concerning the right to freedom of expression and freedom of the press. As highlighted in these guidelines, enhancing the quality of indictment-drafting goes beyond just linguistic

considerations. Rather, we hope that such guidelines may contribute to diminishing the volume of indictments, especially concerning freedom of expression and freedom of the press.

Freedom of expression is the main framework around which this study is organised. The aim of the PEN Norway's guidelines is to broadly outline the principles that should guide the initiation and conduct of investigations where the purported offense is comprised solely of "statements". The primary objective is to provide general guidelines for prosecutors in Turkey in order to ensure that the investigation process is fair, well-reasoned, consistent and aligned with the protection of fundamental rights and freedoms, which is among the duties of prosecutors.

*Caroline Stockford, Turkey Adviser, PEN Norway*  
*Şerife Ceren Uysal, Legal Adviser on Turkey, PEN Norway*



## **A- Guidelines on indictment writing for prosecutors in Turkey**

A fair and effective criminal investigation is essential for a properly functioning criminal justice system. It is a fundamental right protected internationally for all participants in the criminal process - be they victims, suspects/accused, or witnesses- and, of course, for society as a whole, to be informed about the acts that are defined as offences, allowing them to anticipate the consequences of their conduct. A judicial regime where the principles of predictability and legal certainty are systematically ignored, undermines the possibility of a state of law.

However, the criminal process is complex in structure, which makes it impossible to apply precise mathematical formulae to all cases. The particularity of each case stems from its unique facts but that does not change the fact that there are fundamental principles that the prosecutors must follow in all cases, regardless of the nature and gravity of the alleged offence or the identity of the suspect. These principles are also incorporated in international documents on the role of prosecutors.

In addition to the professional principles that prosecutors are expected to abide by, in almost every criminal law regime where the rule of law principle is adopted, there are common formal and substantive criteria that are derived from universal rules of criminal law and must be met during the transition from an accusation

to a trial, regardless of the certain differences according to the legislation of each country and the criminal law regime adopted.

The aim of these guidelines are to point out the practical problems frequently encountered in indictments, which are the basic building blocks of the criminal proceedings in Turkey, and to provide a framework for the drafting of lawful indictments that respect the right to defence without undermining criminal justice or breaching fundamental rights and freedoms. The indictment is a document of fundamental importance for any criminal proceeding, as underlined by legal researcher and lawyer Kasım Akbaş, in his article titled “Point Zero of a Trial: The Indictment”<sup>6</sup> which was published in PEN Norway Turkey Indictment Project Final Report 2020.

An indictment is a document containing allegations; it is prepared within the “investigation” process that is carried out by the prosecution. It alleges a criminal act, and the prosecution phase of a trial begins with the admission of this document by the court. Hence, the indictment is also the legal document that separates the two stages of the trial, that are: the investigation and prosecution.

These guidelines will first briefly summarise the internationally recognised basic principles for prosecutors, followed by a reminder of the established rules on indictments under the Turkey’s criminal law regime. Since the PEN Norway Turkey Indictment Project is focused on indictments related to freedom of expression in general, the guidelines will highlight the regulations under the Constitution of the Republic of Turkey (Constitution) and the European Convention on Human Rights (ECHR). While examining the aforementioned legal frameworks and internationally recognised principles, which are of fundamental importance for criminal investigations and therefore for indictments, we will showcase examples of imperfections and shortcomings identified within the scope of the project. Finally, the guidelines will present a set of questions regarded as essential for inclusion in a checklist, which would allow the drafting of indictments that do not violate human rights in general, and the right to defence and freedom of expression in particular.

## B- The role of prosecutors in criminal investigations and the principles of the prosecution profession

### B-1: The role of prosecutors in criminal investigation according to the Code of Criminal Procedure:

In Turkey, the duties of prosecutors are regulated under the Code of Criminal Procedure (CCP).<sup>7</sup> According to Article 160 of the CCP.

(1) As soon as the public prosecutor is informed of a fact that creates an impression that a crime has been committed, either through a report of crime or any other way, s/he shall immediately investigate the factual truth, in order to make a decision on whether to file public charges or not.

(2) In order to investigate the factual truth and to secure a fair trial, the public prosecutor is obliged, through the judicial security forces, who are under her/his command, to collect and secure evidence in favor and in disfavor of the suspect, and to protect the rights of the suspect.

Undoubtedly, Article 160 of the CCP defines the main duty of prosecutors in the criminal system of Turkey. In the justification of this article, the legislator provides the following explanation:

The Article sets out the main duty of the public prosecutor. As soon as the public prosecutor becomes aware of what appears to be the committing of a criminal offence, he or she will immediately take action to establish the truth, with the aim of deciding whether or not to initiate a public prosecution. (...)

(...) The public prosecutor shall investigate the facts in favour of and against the suspect with equal effort. At the same time, evidence, traces, artefacts and signs of the crime shall be collected and preserved. As it is known, three principles should prevail in the activities of the body that fulfils the main task in the investigation phase: These are efficiency, speed, honesty

and fairness. The provision in the second paragraph of the Article is a requirement of the principle of honesty. Similarly, Article 160 of the German Code of Procedure incorporates this principle. According to Article 6 of the European Convention on Human Rights, every person has the right to a fair trial. The investigating body is obliged to collect evidence in an ethical manner.

As underlined by legal researcher and lawyer Kasım Akbaş in his article titled “Point Zero of a Trial: The Indictment” written within the scope of the PEN Norway’s project, “a careful reading of the regulation and the text of the justification in question would lead to the following necessary conclusion:

- a) An investigation is not the action taken when he is “informed of that a crime has been committed” but when he is “informed of a fact that creates an impression that a crime has been committed”;
- b) Investigation aims to search for the “truth”, not the “crime.”<sup>8</sup>

In practice, there are numerous complaints and criticisms that while conducting the investigations and drafting indictments, prosecutors generally prioritize building a case for punishment over uncovering the full truth. It should also be noted that all 29 indictments analysed within the scope of the Turkey Indictment Project were found to be controversial in the context of Article 160 of the CCP.

## **B-2: UN Guidelines on the Role of Prosecutors:**

Adopted at The Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana in 1990, The Guidelines on the Role of Prosecutors<sup>9</sup>, is a document of fundamental importance for the prosecutorial profession. In its introduction, the relevant Guidelines state that it has been formulated to assist Member States in their tasks of securing and promoting the effectiveness, impartiality and fairness of prosecutors in criminal proceedings.

Principle 12 of the Guidelines on the Role of Prosecutors reads as follows:

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.

Principle 13 of the same Guidelines defines the principles that prosecutors must uphold when performing their duties:

In the performance of their duties, prosecutors shall:

- a) Carry out their functions impartially and avoid all political, social, religious, racial, cultural, sexual or any other kind of discrimination;
- b) 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;
- c) Keep matters in their possession confidential, unless the performance of duty or the needs of justice require otherwise;
- d) Consider the views and concerns of victims when their personal interests are affected and ensure that victims are informed of their rights in accordance with the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

Principle 14 from the same Guidelines holds significant importance. It stipulates that, rather than pursuing an indictment in every instance, prosecutors are also duty bound to terminate an investigation or, if already initiated, a prosecution when there is no indication of an offense being committed.

Prosecutors shall not initiate or continue prosecution, or shall make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded.

### B-3: European Guidelines on Ethics and Conduct for Public Prosecutors<sup>10</sup>

The European Guidelines on Ethics and Conduct for Public Prosecutors, also known as the Budapest Guidelines, was adopted by the Conference of Prosecutors General of Europe convened by the Council of Europe in 2005. In its introduction, the Guidelines underline that the principles are not binding, but should be seen as containing widely accepted general principles for public prosecutors in the performance of their duties and which can be considered as guidance at national level concerning ethical and similar questions. It is also stated that the Guidelines set out standards of conduct and practice expected of all prosecutors.<sup>11</sup>

Perhaps the most important principle of the Budapest Guidelines is the first principle entitled “Basic Duties”. The principle reads follows:

- » Public Prosecutors should at all times and under all circumstances
- » Perform their duties, including the duty to take action, always in accordance with relevant national and international law,
- » Carry out their functions fairly, impartially, consistently and expeditiously,
- » Respect, protect and uphold human dignity and human rights,
- » Take into account that they are acting on behalf of society and in the public interest,
- » Strive to strike a fair balance between the general interests of society and the interests and rights of the individual.

The second principle, which concerns the professional conduct of prosecutors in general, is rather comprehensive. It covers a wide range of topics from the obligation of prosecutors to maintain the honour of their profession to the obligation to improve themselves by keeping themselves abreast of legal and social developments. The following sub-principles within this principle are particularly noteworthy:

- g) Perform their duties fairly and without fear, favour or prejudice,
- h) Remain unaffected by individual or sectional interests and public and media pressures,
- i) Respect the right of all persons to be held equal before the law and abstain from discrimination against any person on any ground such as gender, race, colour, language, religion, political or other opinion, sexual orientation, national or social origin, association with a national minority, property, birth, health, handicaps or any other status. (...)

The third principle of the Budapest Guidelines focuses on the professional conduct of prosecutors in the framework of criminal investigations. The first sub-principle describes the obligations of prosecutors to uphold the principle of the right to a fair trial, which is clearly expressed in Article 6 of the ECHR and in the case law of the European Court of Human Rights (ECtHR). Explicitly mentioned are many sub-principles such as carrying out their functions fairly, impartially, objectively, and independently, seeking to ensure that the criminal justice system operates as expeditiously as possible, respecting the principle of presumption of innocence, and accessing facts and evidence to the suspect's advantage.

#### **B-4: Constitutional<sup>12</sup> and ECHR<sup>13</sup> provisions related to the duties of prosecutors**

As mentioned before, when conducting criminal investigations, prosecutors are obliged—among many other things—to respect human rights, to protect the rights of suspects, to avoid violating the presumption of innocence, not to discriminate, and to be impartial.

Therefore, it is evident that prosecutors must consider certain provisions within the Constitution of the Republic of Turkey, without exception, throughout every investigation. Some of these relevant constitutional provisions are as follows:

### **- Constitution Art. 10/1: Equality Before the Law**

Everyone is equal before the law without distinction as to language, race, colour, sex, political opinion, philosophical belief, religion and sect, or any such grounds.

### **- Constitution Art. 13: Restriction of Fundamental Rights and Freedoms**

Fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution without infringing upon their essence. These restrictions shall not be contrary to the letter and spirit of the Constitution and the requirements of the democratic order of the society and the secular republic and the principle of proportionality.

### **- Constitution Art. 20: Privacy of Private Life**

Everyone has the right to demand respect for his/her private and family life. Privacy of private or family life shall not be violated.

### **- Constitution Art. 25: Freedom of Thought and Opinion**

Everyone has the freedom of thought and opinion.

No one shall be compelled to reveal his/her thoughts and opinions for any reason or purpose; nor shall anyone be blamed or accused because of his/her thoughts and opinions.

### **- Constitution Art. 26: Freedom of Expression and Dissemination of Thought**

Everyone has the right to express and disseminate his/her thoughts and opinions by speech, in writing or in pictures or through other media, individually or collectively. This freedom includes the liberty of receiving or imparting information or ideas without interference by official authorities. This provision



shall not preclude subjecting transmission by radio, television, cinema, or similar means to a system of licensing. (...)

#### **- Constitution Art. 27: Freedom of Science and the Arts**

Everyone has the right to study and teach, express, and disseminate science and the arts, and to carry out research in these fields freely. (...)

#### **- Constitution Art. 28: Freedom of the Press**

The press is free, and shall not be censored. The establishment of a printing house shall not be subject to prior authorisation or the deposit of a financial guarantee.

The State shall take the necessary measures to ensure freedom of the press and information. (...)

#### **- Constitution Art. 38: Principles relating to Offences and Penalties**

No one shall be punished for any act which does not constitute a criminal offence under the law in force at the time committed; no one shall be given a heavier penalty for an offence other than the penalty applicable at the time when the offence was committed;

The provisions of the above paragraph shall also apply to the statute of limitations on offences and penalties and on the results of conviction.

Penalties, and security measures in lieu of penalties, shall be prescribed only by law.

No one shall be considered guilty until proven guilty in a court of law.

No one shall be compelled to make a statement that would incriminate himself/herself or his/her legal next of kin, or to present such incriminating evidence.

Findings obtained through illegal methods shall not be considered evidence.

Criminal responsibility shall be personal. (...)

A close analysis of the ECHR's content reveals many parallels with the Constitution of the Republic of Turkey. Below are the fundamental rights outlined in the ECHR that a prosecutor must carefully refrain from violating during the investigation:

### **- ECHR Art. 1: Obligation to Respect Human Rights**

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

### **- ECHR Art. 6: Right to a Fair Trial**

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence; (...)

### **- ECHR Art. 7: No Punishment without Law**

1. 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 when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. (...)

### **- ECHR Art. 8: Right to Respect for Private and Family Life**

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

### **- ECHR Art. 10: Freedom of Expression**

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. (...)

### **- ECHR Art. 14: Prohibition of Discrimination**

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

### **- ECHR Art. 18: Limitation on Use of Restrictions on Rights**

The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.

The ECHR regulations quoted here refer to fundamental rights and freedoms for a prosecutor, which must be taken into account in

every investigation without exception, just as it was stated above for the Constitutional regulations. However, Article 4 of Protocol No. 7 of the ECHR must also be included in the prosecutors' checklist. This article regulates the right "not to be tried and punished again for the same offence". Similarly, it should be kept in mind that Protocol No. 12 is structured under the heading "general prohibition of discrimination" and in this context, broadens the prohibition of discrimination enshrined in the main convention.

### **B-5: Criteria required for a valid indictment as prescribed by the Code of Criminal Procedure:**

The criteria for indictments are prescribed in detail in Article 170 of the CCP.<sup>14</sup> The wording of the article is as follows:

- (1) The duty to file a public prosecution rests with the public prosecutor.
- (2) In cases where, at the end of the investigation phase, collected evidence constitute sufficient suspicion that a crime has been committed, then the public prosecutor shall prepare.
- (3) The indictment, addressed to the court that has subject matter jurisdiction and venue, shall contain;
  - a) The identity of the suspect,
  - b) Her/his defense council,
  - c) Identity of the murdered person, victim or the injured party,
  - d) The representative or legal representative of the victim or the injured party,
  - e) In cases, where there is no danger of disclosure, the identity of the informant,
  - f) The identity of the claimant,
  - g) The date that the claim had been put forward,
  - h) The crime charged and the related Articles of applicable Criminal Code,
  - i) Place, date and the time period of the charged crime,
  - j) Evidence of the offense,
  - k) Explanation of whether the suspect is in detention or not,

and if s/he is arrested with a warrant, the date s/he was taken into custody and the date of her/his arrest with a warrant, and their duration.

(4) The events that comprise the charged crime shall be explained in the indictment in accordance to their relationship to the present evidence; and information that is irrelevant to the events constituting the alleged offence and the evidence of the offence shall be excluded.

(5) The conclusion section of the indictment shall include not only the issues that are unfavorable to the suspect, but also issues in his favor.

(6) At the conclusion section of the indictment, the following issues shall be clearly stated: which punishment and measure of security as foreseen by the related Law is being requested to be inflicted at the end of the adjudication; in cases where the crime has been committed within the activities of a legal entity, the measure of security to be imposed upon that legal entity.

The expression “information that is irrelevant to the events constituting the alleged offence and the evidence of the offence shall be excluded” was added to the article on 08.07.2021. This marks a significant development as it demonstrates that an issue frequently highlighted in the indictment review reports produced as part of the PEN Norway Turkey Indictment Project has indeed been acknowledged by the legislator and is aimed to be tackled. Such an amendment was called for as there were numerous findings indicating that indictments included many details unrelated to the suspect or the alleged offence. As human rights lawyer Tony Fisher, who analysed the indictment against Can Dündar and Erdem Gül, noted in his legal report on the indictment:

The changes made to Article 170/4 of the Turkish Criminal Procedure Code in July 2021 instructing prosecutors not to include irrelevant materials in indictments do show some awareness that this practice is unacceptable. Let us hope

that they will take heed of these changes in future cases. (*Can Dündar & Erdem Gül Indictment Report*)<sup>15</sup>

Regrettably, our reports indicate that despite the amendments made in the CCP, the old practice persists today.

It should also be noted that Article 170 of the CCP, despite room for improvement, establishes a robust foundation for crafting cohesive indictments fulfilling the aforementioned basic criteria. When implemented appropriately, this allows for the proper exercise of the right to defence. The Norwegian judge Heidi Heddgal, who analysed three separate indictments within the scope of the Turkey Indictment Project, frequently raised this issue in her reports:

The next recommendation is simply to follow CCP Article 170 down to the last letter. If that is done, the indictment will give the defendant the necessary information. (*Pelin Ünker Indictment Report*)<sup>16</sup>

CCP Article 170 is in fact a very good instrument for writing indictments of good quality in line with established international standards. The article is like a checklist of points that if followed will result in an objective, impartial, readable and functional indictments. (*Fincancı, Önderoğlu, Nesin Indictment Report*)<sup>17</sup>

Although experts involved in the Turkey Indictment Project have pointed out the merits of this article, it is still observed in practice that many indictments fall short of meeting the requirements outlined in the article.

## **C- Indictments in Turkey in the light of the relevant legislation and adopted principles**

A review of all the national and international legal documents referred to above, including the CCP reveals certain principles common to all of them. Those principles are efficiency, expeditiousness, honesty and fairness, impartiality, acting without prejudice, non-discrimination, incorporating the essential elements of an indictment, collecting evidence to the suspect's advantage as well, ensuring that evidence is lawfully obtained, refusing evidence obtained through unlawful methods, serving the fair administration of justice, acting in accordance with the law, respecting human dignity, protecting human rights, respecting the principle of equality of arms before the law, performing their duties without the interference of the public, media or other bodies, and respecting the presumption of innocence. Without delving into each of these criteria under separate chapters, it is crucial to highlight some of the concerns identified in the 29 reports analysed within the scope of PEN Norway Turkey Indictment Project, as this is important to reveal a fundamental issue associated with indictments. Therefore, the emphasis will be on the most commonly encountered shortcomings and defects discovered during the course of the Indictment Project.

### **C-1: Omission of legally required elements in indictments**

Published by the Council of Judges and Prosecutors (CJP), the document titled "Recommendations on Indictments and Other Decisions"<sup>18</sup> analyses a selection of indictments and identifies certain shortcomings and defects. Subsequently, it offers recommendations to prosecutors for addressing these issues, referencing relevant legal provisions.

Certain indictments examined under the eight chapter of the Recommendations are found "to have omitted the legally required elements in indictments." Among the deficiencies exemplified in the Recommendations of the CJP are: failure to clearly demonstrate the

identity of the suspect, failure to include the names of obligatory defence counsellors or attorneys or legal representatives in the indictment, failure to include other legally required elements in the indictment such as the date of the complaint, the place, date, and time period of the offence, as set out in Article 170 of the CCP, as well as failure to include witness statements, forensic medicine or similar expert reports in the indictment, and in the case of suspects who are detained or arrested, failure to include the dates suitable for the determination of the time spent in detention or arrest.<sup>19</sup>

Certain indictments analysed by the PEN Norway Turkey Indictment Project are found to have similar shortcomings. For example, the legal report analysing the indictment issued against journalist Berzan Güneş found that the date of the offence and the date of the acts did not concur.

(...) the date of the offence was claimed to be April 4, 2018. This date can neither be matched with one of the social media posts nor with another event mentioned in the indictment. (*Berzan Güneş Indictment Report*)<sup>20</sup>

The review of the indictment issued against journalist Necla Demir identified a similar confusion regarding the date of the offence:

In the present indictment, date and place are stated as "11/01/2019 ISTANBUL/CENTRAL". The unspecified nature of the information is immediately noticeable. No further details are given as to what event the prosecutor is referring to. On second glance, an even bigger deficiency becomes apparent. The date "11 January 2019" can neither be matched with the date of one of the two articles presented as evidence (6 and 10 October 2016) nor any other date mentioned in the document. (*Necla Demir Indictment Report*)<sup>21</sup>

Similarly, the report on journalist Nedim Türfent's indictment arrived at a finding akin to the CJP's point regarding the defects in the presentation of evidence and the determination of the date of the offence:



*While it is apparent that the evidence has been submitted in valid form, the detection record dated 13.04.2016 referred to in the conclusion of the indictment and Facebook and Youtube content are not among the evidence.(...) s, the purpose for CPL article 170/3 is not writing the evidence one by one but to ensure that the content is written clearly enough so that the defendant can understand it and defend themselves. In this sense, the initial evidence that led to the launch of an investigation in the scope of this indictment and the content of the record dated 13.04.2016 that the indictment and the arrest warrant are based on is incomprehensible. Therefore, although it appears that the evidence has been listed in form, it is clear that the requirement mandated by CPL article 170/3 to specify evidence has not been fulfilled. (Nedim Türfent Indictment Report)<sup>22</sup>*

Judge Heidi Heddgal, the author of the examination report on the journalist Pelin Ünker Indictment, summarised the evidentiary shortcomings as follows:

The list of evidence does not fulfill its purpose. It is the duty of the prosecutor to connect the evidence to the alleged crime. If there is any part of the articles that can be considered a crime according to TPC Article 270, these parts must be cited accurately and in whole in the indictment. The lack of this information is a serious violation of CCP Article 170 and leaves the defendant in total ignorance of both her alleged crime and the evidence that is supposed to support the allegation. As shown below, this is also a violation of international standards for fair trial. (Pelin Ünker Indictment Report)<sup>23</sup>

## **C-2: Failure to provide sufficient detail regarding the offensive action in the indictment:**

Under the 9th sub-heading, the aforementioned Recommendation<sup>24</sup> by the CJP pointed out another issue. The section titled “Failure to Provide Sufficient Detail Regarding the Offensive Action in the Indictment” reads as follows:

---

# Recommendations for drafting indictments that do not violate rights and freedoms:

---

## Simple rules to follow for prosecutors

- » It has been observed that in some indictments a single sentence may be longer than 10 lines. Sentences, however, should be short, clear and intelligible.
- » Attention should be paid to employ paragraphs to enhance narrative coherence and overall comprehensibility.
- » It is important that indictments have sub-headings that are absolutely consistent with the content.
- » The indictment must organise the evidence in chronological order.
- » When the alleged offence or evidence thereof consists of only one statement (in the form of an article, a social media post or a statement), the indictment, instead of selectively quoting it, should quote the entire content to make it easier to understand the context and the substance as a whole.
- » The indictment should make it clear what is and what is not a direct quotation and all quotations must be cited.
- » As stated in the aforementioned Recommendations text of the CJP, the expressions and phrases that are not completely legal must be avoided.
- » Given that certain offences have strict deadlines for the initiation of prosecution, it is important to ensure that the date of the indictment, as well as the date of the offence, is legibly mentioned in the indictment.

## Checklist:

- » Does the indictment incorporate all the legally required elements as mandated by Article 170/3 of the CCP?
- » Is there a pending investigation or prosecution against the suspect for the same offence?
- » Was a decision made not to prosecute or to acquit the suspect if they have already been tried for the same offence?
- » Does the law specify a specific time limit for prosecuting the alleged offence?
- » Is there a legal justification for the suspect's offensive act?
- » Has the exculpatory evidence been collected and recorded in the indictment?
- » Is there evidence that substantiates a strong suspicion warranting an indictment against the suspect?
- » Does the indictment record all the inculpatory and exculpatory evidence in a chronological order and in a language that is comprehensible?
- » Does the indictment establish a nexus between the inculpatory evidence and the criminal act?
- » Was the evidence included in the indictment lawfully obtained?
- » Does the indictment contain any assertions which could infringe upon the presumption of innocence for either the suspect or a third party?
- » Are there statements and narratives in the indictment that are unrelated to the suspect or the alleged offence?
- » Is the allegedly offensive "expression" protected under national and international legislation?
- » Does the indictment lead to a disproportionate interference with any fundamental right enshrined by the Constitution and/or the ECHR?

It has been determined that public lawsuits have been filed on the grounds that a crime was committed based on certain indictments that does not provide any explanation that linked the incident with the existing evidence, using abstract statements of unclear scope such as “he/she threatened, insulted, uttered sexually explicit remarks, sexually assaulted, ill-treated, resisted the officer in charge, resisted, took by force, damaged property, defrauded, deprived someone of their liberty, acted in violation of the Forestry Law, committed the imputed offence”, without any description of the criminal acts and based solely on the statements of the complainant and the suspect. (*CJP, Recommendations on Indictments and Other Decisions*)

This issue stands as one of the most prevalent problems identified within the indictments analysed by PEN Norway. In this sense, the CJP’s conclusions are validated by the legal report on the Özgür Gündem Newspaper indictment, filed after a police raid on the newspaper’s premises targeting journalists present:

Before assessing the stated evidence in terms of domestic law as well as international law, one of the biggest flaws of this indictment has to be stressed. The prosecutor does not attribute the quotes to a specific person. All 22 journalists are accused of insulting the police officers, however, it is not clear who has made the remarks in question. For an objective reader it is truly unthinkable that all 22 journalists said the words as suggested in the indictment in unison. (*Özgür Gündem Raid Indictment Report*)<sup>25</sup>

The report analysing the indictment filed against journalist Seyhan Avşar Oğuz made the following point:

A crucial part of any indictment is to connect the alleged criminal actions to the elements of the applicable article in TPC. In this indictment, this part is totally missing. There is no explanation why the articles represent a breach of personal rights or amounted to an insult of the prosecutors. Furthermore, there is no definition of an “insult”. That the

content of articles are considered to be insulting is not sufficient to justify a criminal investigation against Avşar. (*Seyhan Avşar Oğuz Indictment Report*)<sup>26</sup>

In the legal report on an indictment filed against journalist Canan Coşkun, the following issues were raised:

As is known, CCP Article 170/4 tasks the prosecutors with explaining the events that constituted the alleged offence in relation with the existing evidence. As the report did not contain any remarks that marked as targets Berk Ercan, nor his family nor the prosecutor who was in charge of the investigation, it is effectively impossible for it to fulfil the requirements in CCP Article 170/4. (*Canan Coşkun Indictment Report*)<sup>27</sup>

### **C-3: Omission of exculpatory evidence in indictments:**

A prevalent finding within the legal reports authored under the Turkey Indictment Project stresses the prosecutors' failure to consider exculpatory evidence. For example:

As such, if acts such as the composition of articles and conducting of interviews, which are a necessary component of the suspect's profession, are deemed and adduced to be culpable acts and if not a single other act has been asserted in connection with the imputed charges, then it is evident that consideration must absolutely be given to the suspect's profession. Here, the suspect's profession indisputably amounts to favourable evidence. The non-inclusion of this point in the indictment places the legality of the indictment in question within the context of Article 170/5 of the Code of Criminal Procedure. (*Deniz Yücel Indictment Report*)<sup>28</sup>

As such, it is impossible to claim that an indictment is written in accordance with CCP Article 170/3 when the evidence is only superficially listed, no exculpatory evidence is considered and no access to evidence is provided. (*Canan Coşkun Indictment Report*)<sup>29</sup>

it was observed that 4 of the witnesses stated such remarks as: “a journalist for DİHA [Dicle News Agency]”, “DİHA reporter”, “he works with the DİHA agency” concerning the defendant, 1 [E. D. K.] said: “he is a journalist in Yüksekova”, 5 said he “conducts press activities”, “I saw him doing interviews”, “I know him as a journalist”. But it was determined that in the indictment the Prosecution did not mention that the defendant was a journalist. This also indicates a significant deficiency. This fact gives the impression that evidence in the defendant’s favor was not mentioned and only sentences that could be interpreted as being against the defendant were selected and used as the basis for the indictment. (*Nedim Türfent Indictment Report*)<sup>30</sup>

#### **C-4: A common emphasis of all principles and legal regulations: Expeditiousness**

Considering the above-mentioned principles as well as the legislation, prosecutors are expected to conduct investigations expeditiously. This is imperative both for safeguarding public order and for swiftly vindicating suspects facing potential prosecution when no crime has been committed on their part. The Recommendations<sup>31</sup> by the CJP deals with the delayed indictments under the 13th sub-heading and makes the following points:

As mentioned in detail under the examination report dated 24/05/2012, it has been determined that a total of 145 files (with the serial number between 1 and 145) were put on hold for 3 months to 13 months following the collection of evidence, and indictments were issued only later.

At this juncture, the overwhelming majority of the 29 indictments analysed within the framework of the PEN Norway Turkey Indictment Project indicate a troubling pattern, if not a more alarming one. The Gezi Park indictment, which is about the Gezi Park protests in 2013, is dated 19 February 2019. Journalist Nedim Türfent was arrested on 13.05.2016 and his indictment was issued 9 months and 24 days later, on 07.03.2017. As pointed out in the Legal Report on Nedim Türfent Indictment;

When we examine article 6/1 of the European Convention on Human Rights we can clearly see that everyone is entitled to a fair and public hearing within a reasonable time.<sup>7</sup> In the case of Nedim Türfent, he was detained 9 months and 24 days before the indictment was written and he was brought before a judge for the first time in his 14th month of detainment giving the impression that a violation was committed in the very first stage according to ECHR article 6/1. (*Nedim Türfent Indictment Report*)<sup>32</sup>

The legal report on the indictment against journalist Deniz Yücel discovered the same problem:

The indictment against Deniz Yücel was issued on 13.02.2018, i.e. a full year from the date on which he was arrested. (*Deniz Yücel Indictment Report*)<sup>33</sup>

Likewise, it was discovered that the indictment against journalist Ahmet Altan was issued on 11.04.2017, seven months after 23.09.2016, the date of Altan's arrest.<sup>34</sup> Another example of a long indictment preparation process was the indictment filed against the Özgür Gündem Newspaper. The experts who analysed the indictment were surprised by the time gap between the incident and the issuing date of the indictment:

As stated in Chapter 2, the date of the alleged crimes (16 August 2016) and the date of issue of the indictment (27 September 2017) lie more than a year apart. At first glance, the indictment does not seem overly complicated nor does it seem of extensive length. Therefore, the question arose why the investigation phase and drafting of the indictment extended over a period of more than 13 months. (*Özgür Gündem Raid Indictment Report*)<sup>35</sup>

The legal analysis report on the indictment against journalist Seyhan Avşar Oğuz underscored that while the articles deemed criminal were published in March 2019, the indictment was not filed until September 19, 2019:

(...) [T]he court decided to drop the case related to the Press Law Article 26, as the indictment was not accepted by the

court within four months after the publications of the articles. (*Seyhan Avşar Oğuz Indictment Project*)<sup>36</sup>

### **C-5: The indictments' treatment of the "Presumption of Innocence":**

The prosecutorial obligation to safeguard the rights of suspects is explicitly emphasized in both national and international legal frameworks. A crucial prerequisite for upholding the rights of suspects is ensuring that the fundamental human right of the presumption of innocence is not infringed upon. The legal reports written for PEN Norway Turkey Indictment Project indicate concerned themselves with these results in this regard too:

#### **- Necla Demir Indictment Report:**

Both Principles were disregarded within this indictment, as the prosecutor failed to discontinue his prosecution even after it became evident that a clear link between evidence and accused crime could not be established. This in turn heavily violates Art 6/2 ECHR, the presumption of innocence, an essential core function of the "right to a fair trial" as guaranteed by Art 6 ECHR.<sup>37</sup>

#### **- Abdurrahman Gök Indictment Report:**

Especially considering the year of the detention was in 2018, the year the indictment was issued was 2020 and the year verdict was handed down was 2022 (additionally, a prison sentence is under appeal as of now), it becomes clear that we are talking about a person who has been under the threat of punishment for at least 4 years and the extent of the problem can be more fully understood.<sup>38</sup>

#### **- Diyarbakır / Kurdish Journalists Indictment Report:**

In the context of Article 170/4 of the CCP, a noteworthy point in the indictment needs to be addressed separately. The indictment names another journalist, who is not a suspect in



this investigation, a total of 30 times, providing their full identity details. In accordance with the presumption of innocence and the principle of respecting private life, the journalist's name will not be disclosed in this report. The indictment not only disclosed the identity, private life, and professional activities of this journalist, but they are also repeatedly referred to as a suspect 30 times. A fact that once again reinforces the feeling that one is reading a police report rather than an indictment.<sup>39</sup>

### **C-6: The indictments' treatment of the "Freedom of Expression"**

As it was underlined, the protection of fundamental rights and freedoms is a prosecutorial duty. This means that each and every prosecutor is obliged to protect freedom of expression and to prevent its arbitrary restriction. Regrettably, the findings of our study paint quite a negative picture in this domain. Here, it will be enough to mention some of the findings recorded in the reports.

#### **- Osman Kavala & Others The Gezi Park Trial Indictment Report:**

Further and crucially there are elemental legal flaws in the indictment in terms of its lack of adherence to international human rights law, particularly in its approach towards peaceful and lawful activity in relation to the rights of freedom of association and expression, rights essential to the preservation of a democratic society.<sup>40</sup>

#### **- Pelin Ünker Indictment Report:**

News articles about the content of the so-called "Paradise Papers" were published all over the world. Pelin Ünker was the only journalist who faced criminal charges. Freedom of expression constitutes one of the essential foundations of a democratic society. It was within Ünker's job as an investigative journalist to write these articles and it is clear that her rights according to ECHR Article 10 was violated.<sup>41</sup>

#### **- Cumhuriyet Newspaper Indictment Report:**

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.<sup>42</sup>

#### **- Fincancı, Önderoğlu, Nesin Indictment Report:**

The indictment should also discuss whether the articles exceed the limit of the freedom of speech, both according to national law and international standards. Freedom of speech and freedom of the press are mentioned in the indictment, however not discussed just dismissed.<sup>43</sup>

#### **- Çapan, Aykol, Keskin Indictment Report:**

As the prosecutor of this indictment stated initially, Freedom of the Press is not limitless. This, in its core is correct. But in order to restrict a media outlet's protection under Freedom of the Press, the reasons for these restrictions need to be legitimate according to Art. 10 (2) ECHR and Art. 19 (3) ICCPR.<sup>44</sup>

#### **- Bülent Şık Indictment Report:**

The major problem with the indictment, is that the actual facts do not seem to constitute a crime at all, when the Articles of the Turkish Penal Code are understood in conjunction with the principles of freedom of expression.<sup>45</sup>

#### **- Seyhan Avşar Oğuz Indictment Report:**

There is no reference to Turkish Press Law Article 3 and the freedom of the press to acquire and report information. There is no reference to the right to freedom of speech, which is enshrined both in The Constitution of Republic of Turkey and in ECHR Article 10. (...) The conclusion is that the indictment against Avşar for insulting a public officer violates her right to freedom of expression enshrined in Article 10 of the ECHR. The indictment also violates the Constitution of Republic of Turkey.<sup>46</sup>

### **- Veysel Ok Indictment Report:**

In the specific case of Veysel Ok, various aspects of the freedom of press and expression are combined. First of all, as a lawyer, he should enjoy a high level of protection while expressing himself at trial or in the context of his activities as a defence lawyer. Although the statement that he made can be seen outside of this context, Veysel Ok still acted from the central position in the administration of justice as an intermediary between the public and the courts. In line with the case law of the ECtHR, his statement is important for the public in order to have confidence in the ability of the legal profession to provide effective representation. By being critical of the judicial system, Veysel Ok is trying to gain confidence and fulfilling his duty in this respect. The indictment at face value therefore can be seen to violate the freedom of expression as laid down in Article 10 ECHR.<sup>47</sup>

### **C-7: The prosecutor's obligation to be impartial:**

The primary cause for concern in the majority of the indictments examined under the PEN Norway Turkey Indictment Project is the emerging suspicion that the prosecutors behind them may be driven more by a punitive agenda than a commitment to uncovering the material truth.

The legal report on the Osman Kavala & Others, The Gezi Park Trial indictment expressed this concern as follows:

There should be rigorous oversight of the such indictments by those within the public prosecutor's office, to ensure that a prosecutor does not get 'carried away' and end up drafting an indictment in line with any official or personal ideology but with scant adherence to the law or objective assessment of the evidence. This is a question of proper management. It is impossible to think that this indictment was properly or sufficiently managed and checked by a competent officer of the law.<sup>48</sup>

However, this is not the only example. In the analysis of the journalists Fincancı, Nesin, Önderoğlu indictment, the following observation was made:

It seems apparent that the prosecutions of the three defendants were politically motivated and not by any standards impartial.<sup>49</sup>

The following observation in the legal report on the indictment filed against journalist Hikmet Tunç Kumli summarises the whole problem as follows:

The failure to write a successful indictment even for such an uncomplicated case with straightforward evidence in hand, and the existence of a biased motivation in the indictment to restrict the freedom of expression rather than to present the facts, charges and the evidence are matters of serious concern. This indictment alone reveals the prevalent motivation behind the 'subliminal message' allegations in Ahmet Altan indictment, or the fabrication of crimes based on the travel logs of the person in Osman Kavala-Espionage indictment, or the criminalization of a meeting that was held in a glass-covered transparent room in Büyükkada indictment. Because the common feature of all those indictments are their clear willingness and motivation to charge rather than investigating the criminal suspicion.<sup>50</sup>

### **C-8: Other issues of concern**

Obviously, it is not possible to include in these guidelines all the problems identified in relation to indictments. Nevertheless, it is deemed beneficial to highlight certain noteworthy points here to ensure future indictments avoid repeating them.

#### **- Inconsistency in dates:**

This issue, which was identified in the journalist Necla Demir indictment, has cast a shadow of doubt over the indictment and the entire investigation process:

Furthermore, according to the indictment the prosecutor got the permission to “initiate the proceedings against the suspect” on 2 January 2020. Even though the domestic law of Turkey speaks of a “permission to initiate the investigation”, in practice the permission is rather given with regards to the “issuance of the indictment”. This means that in most instances investigations are already ongoing when the permission of the Ministry of Justice is obtained. Therefore, to be able to get a permission on the second day of 2020, an investigation must have been ongoing at least since 2019 - maybe even before that. When taking a closer look at the following chronology, a mysterious scenario presents itself: the start of the investigation, the application for permission to issue the indictment as well as the confirmation by the Ministry of Justice presumably all took place within the first two days of 2020 (nota bene 1 January 2020 is a public holiday). This scenario seems almost impossible and leaves doubts regarding the correct and lawful implementation of the proceedings.<sup>51</sup>

**- Incomplete, false or out-of-context quotations:**

The following example is striking in that it highlights the blurred lines between a directly quoted text and the prosecutor’s own phrasing:

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. (*MIT News Trial Indictment Report*)<sup>52</sup>

The analysis of the indictment filed against Cumhuriyet Newspaper, found out that a method of taking quotations out of their contexts was preferred by the prosecutor:

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. (*Cumhuriyet Indictment Report*)<sup>53</sup>

The Legal Report on the journalist Ahmet Altan Indictment discovered that different indictments were used as each other's evidence and that intertwining quotations were used:

A paragraph of the other indictment quoted entirely in this indictment (page 56) refers to a procedure carried out in the investigation file of the indictment examined. It is paradoxical that the two indictments quote each other. These indictments are pending and differ from each other in terms of essential elements such as suspects and allegations. Yet, the broad and farfetched interpretation creates an impression that the only evidence about these allegations is the other indictment; that is to say the prosecutor's method cannot be explained in the context of presumption of innocence. (*Ahmet Altan & Others Indictment Report*)<sup>54</sup>

Indictment against journalist Hikmet Tunç Kumli should also be mentioned here as a striking example:

Unfortunately, the prosecutor picked and chose only certain parts of the decision that fit into the narrative of the indictment and omitted the rest. For these reasons, we get the growing impression that the prosecutor opted for a selective method of inculpatory citation. In a nutshell, it can be said that all the paragraphs of the decision the indictment referred to, except for the part quoted by the prosecutor, was essentially about why the indictment under review should not have been issued at all. (*Hikmet Tunç Kumli Indictment Report*)<sup>55</sup>

Finally, several reports have raised the suspicion that the indictments may have copied full passages directly from police reports authored by the members of the Police Headquarters. For example:

In a total of 61 passages in the indictment, there are sentences that clearly and indisputably demonstrate that the “identification and assessment” in question belonged to the relevant Directorate of Counter-Terrorism Unit. Furthermore, none of these sentences were cited; instead, they were all integrated into the body of the indictment. (...) In short, it can be established beyond any doubt that many sections of the indictment were copied and pasted directly from the police reports and that the basis of the indictment is the police report prepared by the Directorate of Counter-Terrorism Unit. (*Diyarbakır / Trial of Kurdish Journalists Indictment Report*)<sup>56</sup>

**- Extraneous details in indictments unrelated to suspects or allegations:**

As mentioned before, Code of Criminal Procedure was amended on 08.07.2021 to overcome the problem. However, our analysis showed that the same problematic practice continues. For example, the indictment in the Diyarbakır/Kurdish Journalists trial was issued in 24.03.2023, long after the amendment in question. However, the legal report analysing this indictment points out that:

Summarizing a 728-page indictment poses various challenges. As will be explained below, those challenges are primarily due to the extensive detail and repetitive content in the indictment, which is not directly relevant to the accusation, the suspect, or the act in question. Because the nature of the indictment necessitates sifting through a heap of extraneous information to discern the specific accusations and to be able to make a defence. Even based on this first observation, it can be argued that the indictment contains some extraneous content which obstructs the effective exercise of the right of defence. (*Diyarbakır / Trial of Kurdish Journalists Indictment Report*)<sup>57</sup>

## **D- Recommendations for drafting indictments that do not violate rights and freedoms:**

In this section, our recommendations will be presented in two separate groups. The first group of recommendations is related to language and expression, while the second group is directly related to the substance of the indictments.

While these Guidelines do not provide specific instances of problematic narratives employed in the indictments, the legal reports frequently criticized these narrative elements. Since the indictment is not just any text, but the constitutive text of criminal proceedings, any obscurity in its wording directly undermines the right of defence. In this context, prosecutors who draft indictments are advised to follow some simple rules:

- » It has been observed that in some indictments a single sentence may be longer than 10 lines. Sentences, however, should be short, clear and intelligible.
- » Attention should be paid to employ paragraphs to enhance narrative coherence and overall comprehensibility.
- » It is important that indictments have sub-headings that are absolutely consistent with the content.
- » The indictment must organise the evidence in chronological order.
- » When the alleged offence or evidence thereof consists of only one statement (in the form of an article, a social media post or a statement), the indictment, instead of selectively quoting it, should quote the entire content to make it easier to understand the context and the substance as a whole.
- » The indictment should make it clear what is and what is not a direct quotation and all quotations must be cited.
- » As stated in the aforementioned Recommendations text of the CJP, the expressions and phrases that are not completely legal must be avoided.
- » Given that certain offences have strict deadlines for the initiation of prosecution, it is important to ensure that the date of the indictment, as well as the date of the offence, is legibly mentioned in the indictment.



However, it must be underlined that indictment drafting must rigorously abide by the the provisions of the CCP, the Constitution and the ECHR, and the internationally recognised principles for prosecutors must always be observed. The necessity for a checklist comprising specific questions is evident, as we believe it would serve as a guiding and facilitating tool for nearly every prosecutor.

Such a checklist can be easily created based on the following questions:

- » Does the indictment incorporate all the legally required elements as mandated by Article 170/3 of the CCP?
- » Is there a pending investigation or prosecution against the suspect for the same offence?
- » Was a decision made not to prosecute or to acquit the suspect if they have already been tried for the same offence?
- » Does the law specify a specific time limit for prosecuting the alleged offence?
- » Is there a legal justification for the suspect's offensive act?
- » Has the exculpatory evidence been collected and recorded in the indictment?
- » Is there evidence that substantiates a strong suspicion warranting an indictment against the suspect?
- » Does the indictment record all the inculpatory and exculpatory evidence in a chronological order and in a language that is comprehensible?
- » Does the indictment establish a nexus between the inculpatory evidence and the criminal act?
- » Was the evidence included in the indictment lawfully obtained?
- » Does the indictment contain any assertions which could infringe upon the presumption of innocence for either the suspect or a third party?
- » Are there statements and narratives in the indictment that are unrelated to the suspect or the alleged offence?
- » Is the allegedly offensive "expression" protected under national and international legislation?
- » Does the indictment lead to a disproportionate interference with any fundamental right enshrined by the Constitution and/or the ECHR?

## E-Conclusion

PEN Norway supports the right to a fair trial of all citizens in Turkey, their right to express their thoughts and opinions freely in a way that would not incite hatred or violence, and their right to receive balanced and critical news and information from diverse, reputable sources.

With the release of these guidelines, we are ready to engage in a stimulating and constructive dialogue with the Ministry of Justice of Turkey and to produce further materials to assist prosecutors in preparing indictments.

The current practice of writing indictments leads to violations of many fundamental rights and freedoms, especially that of freedom of expression. Similarly, it complicates and at times renders the exercise of the right to a defence impossible. We hope that a reform in indictment writing supported by training and annual audits will result in prosecutors being confident to abide by all contracts, regulations and guidelines laid out in these guidelines. PEN Norway will continue to monitor the situation with its annual examinations of indictments in Turkey by lawyers of international repute and we hope that this picture will soon drastically change for the better.

## Annex: List of indictments analysed within the scope of the study

1. Berzan Güneş Indictment – Clarissa Fondi & Hannah Beck – 10 August 2020
2. Osman Kavala & Others The Gezi Park Trial Indictment – Kevin Dent QC – 9 October 2020
3. Nedim Türfent Indictment – Ş. Ceren Uysal – 5 August 2020
4. Pelin **Ünker** Indictment – Heidi Heggdal – 15 October 2020
5. Deniz Yücel Indictment – Ş. Ceren Uysal – 29 October 2020
6. MIT News Trial Indictment – Ş. Ceren Uysal – 13 November 2020
7. Büyükkada Indictment – Clarissa Fondi & Hannah Beck – 27 November 2020
8. Cumhuriyet Indictment – Aska Fujita QC – 3 December 2020
9. Fincancı, **Önderoğlu**, Nesin Indictment – Heidi Heggdal – 17 December 2020
10. Kavala & Barkey Indictment – Kevin Dent QC – 22 December 2020
11. Ahmet Altan & Others Indictment – Ş. Ceren Uysal – 21 January 2021
12. **Çapan**, Ayköl, Keskin Indictment – Clarissa Fondi & Hannah Beck – 4 February 2021
13. **Özgür** Gündem Raid Indictment – Clarissa Fondi & Hannah Beck – 9 September 2021
14. Demirel & Mavioğlu Indictment – Ezio Menzione – 21 September 2021
15. Bülent **Şık** Indictment – Vidar Stromme – 23 September 2021
16. Seyhan Avşar Oğuz Indictment – Heidi Heggdal – 30 September 2021
17. Veysel Ok Indictment – Jaantje Kramer & Stella Pizzato – 7 October 2021
18. Hikmet Tunç Kumli Indictment – Ş. Ceren Uysal – 14 October 2021
19. Necla Demir Indictment – Hannah Beck & Clarissa Fondi – 21 October 2021
20. Adana Bar Association Indictment – Jaantje Kramer & Stella Pizzato – 28 October 2021
21. Canan Coşkun Indictment – Ş. Ceren Uysal – 11 November 2021
22. Can Dünder & Erdem Gül Indictment – Tony Fisher – 16 December 2021
23. Cengiz **Çandar** Indictment – Barbara Spinelli – 12 January 2023
24. Sedef Kabaş Indictment – Ezio Menzione – 17 January 2023
25. Abdurrahman Gök Indictment – Ş. Ceren Uysal – 19 January 2023

26. Ekrem **İmamođlu** Indictment – Tony Fisher – 28 September 2023
27. Aryen Turan Indictment –Gerrit Jan Pulles & Laura Vroom – 5 October 2023
28. **Şebnem** Korur Fincancı Indictment– Helen Duffy – 12 October 2023
29. Diyarbakır /Trial of Kurdish Journalists Indictment– Ş. Ceren Uysal – 7 November 2023

## Endnotes

- 1 [OHAL döneminde kapatılan medya kuruluşları – International Journalists](#)
- 2 [Avrupa Konseyi raporu: 2018 sonu itibarıyla üye ülkelerde 130 gazeteci cezaevinde, 110'u Türkiye'de – BBC News Türkçe](#)
- 3 [3 Mayıs Dünya Basın Özgürlüğü Günü'ne Türkiye'de 191 gazeteci tutuklu giriyor | Euronews](#)
- 4 [Türkiye 2021'de AIHM'de ifade özgürlüğü ihlallerinde yine ilk sırada, OHAL başvuruları çoğunlukta | Euronews, Türkiye'nin AIHM bilançosu: İfade özgürlüğü ihlallerinde birinci \(bianet.org\)](#)
- 5 A list of the studied indictments and the experts who analysed them is provided in an appendix to these guidelines.
- 6 Kasım Akbaş, “Point Zero of a Trial: The Indictment”, PEN Norway Turkey Indictment Project, 14 January 2021, [Microsoft Word – Kasım Akbas Point Zero EN2.docx \(norskpen.no\)](#)
- 7 For the full text of the Code of Criminal Procedure, see: [00-feridun yenisey \(unodc.org\)](#)
- 8 Kasım Akbaş, Ibid.
- 9 To access the full text of the Guidelines on the Role of the Prosecutors: [Guidelines on the Role of Prosecutors | OHCHR](#)
- 10 To access the full text of the European Guidelines on Ethics and Conduct for Public Prosecutors (Budapest Principles): [CPGE 2005\\_05 – e Budapest Guidelines \(coe.int\)](#)
- 11 Budapest Guidelines, ibid, paragraph 5 and 6.
- 12 For the full text of the Constitution of the Republic of Turkey: [CONSTITUTION OF THE REPUBLIC OF TURKEY \(anayasa.gov.tr\)](#)
- 13 For the full text of the European Convention on Human Rights: [European Convention on Human Rights \(coe.int\)](#)
- 14 To access the latest translation of the Code of Criminal Procedure: [00-feridun yenisey \(unodc.org\)](#). However, we would like to point out that the translation does not incorporate the latest revisions to the law, and as of now, there is no other official translation available.
- 15 Tony Fisher, “Can Dündar & Erdem Gül Indictment Report”, PEN Norway Turkey Indictment Project, 16 December 2021, [Microsoft Word – Dündar Gül TİP EN Final.docx \(norskpen.no\)](#)
- 16 Heidi Heggdal, “Pelın Ünker Indictment Report”, PEN Norway Turkey Indictment Project, 17 December 2020, [Microsoft Word – Pelın Ünker EN.docx \(norskpen.no\)](#)
- 17 Heidi Heggdal, “Fincancı, Önderođlu, Nesin Indictment Report”, PEN Norway Turkey Indictment Project, 15 October 2020, [norskpen.no/wp-content/uploads/2020/12/](#)

- [Fincancı-Nesin-and-Önderoğlu-EN-2.pdf](#)
- 18 The CJP's website did not provide information on the publication date of the relevant text. It is understood that numerous indictments were reviewed to prepare this recommendation, but the methodology followed and the exact number of indictments reviewed to produce this recommendation are not mentioned on the Council's website. However, the Recommendations' summary of some of the main shortcomings and defects in practice remains valuable, as it aligns with numerous findings from PEN Norway's project. To access the full text: [Recommendations on Indictments and Other Decisions \(hsk.gov.tr\)](#)
- 19 [ibid: Recommendations on Indictments and Other Decisions \(hsk.gov.tr\)](#)
- 20 Clarissa Fondi & Hannah Beck, "Berzan Güneş Indictment Report", PEN Norway Turkey Indictment Project, 10 August 2020, [PEN-Norway-Berzan-Gunes-Report-EN-1.pdf \(norskpen.no\)](#)
- 21 Clarissa Fondi & Hannah Beck, "Necla Demir Indictment Report", PEN Norway Turkey Indictment Project, 21 October 2021, [Turkey-Indictment-Project\\_21-October-2021\\_ENG.pdf \(norskpen.no\)](#)
- 22 Şerife Ceren Uysal, "Nedim Türfent Indictment Report", PEN Norway Turkey Indictment Project, 5 August 2020, [PEN-Norway-Nedim-Turfent-Report-EN-1.pdf \(norskpen.no\)](#)
- 23 Heidi Heggdal, "Pelın Ünker Indictment Report", PEN Norway Turkey Indictment Project, 17 December 2020, [Microsoft Word - Pelın Ünker\\_EN.docx \(norskpen.no\)](#)
- 24 [ibid: Recommendations on Indictments and Other Decisions \(hsk.gov.tr\)](#)
- 25 Clarissa Fondi & Hannah Beck, "Özgür Gündem Raid Indictment Report", PEN Norway Turkey Indictment Project, 9 September 2021, [Microsoft Word - Özgür Gündem Hannah Clarissa 9 Sept ENFINAL.docx \(norskpen.no\)](#)
- 26 Heidi Heggdal, "Seyhan Avşar Oğuz Indictment Report", PEN Norway Turkey Indictment Project, 30 September 2021, [Microsoft Word - PEN-Norway-Turkey-Indictment-Project-Avşar 30-sept-2021\\_ENG.docx \(norskpen.no\)](#)
- 27 Şerife Ceren Uysal, "Canan Coşkun Indictment Report", PEN Norway Turkey Indictment Project, 11 November 2021, [Microsoft Word - Canan Coşkun\\_TIP\\_EN\\_Final2.docx \(norskpen.no\)](#)
- 28 Şerife Ceren Uysal, "Deniz Yücel Indictment Report", PEN Norway Turkey Indictment Project, 29 October 2020, [Microsoft Word - Deniz Yucel\\_EN\\_AD.docx \(norskpen.no\)](#)
- 29 Şerife Ceren Uysal, "Canan Coşkun Indictment Report", PEN Norway Turkey Indictment Project, 11 November 2021, [Microsoft Word - Canan Coşkun\\_TIP\\_EN\\_Final2.docx](#)

- (norskpen.no)
- 30 Şerife Ceren Uysal, "Nedim Türfent Indictment Report", PEN Norway Turkey Indictment Project, 5 August 2020, [PEN-Norway-Nedim-Turfent-Report-EN-1.pdf \(norskpen.no\)](#)
- 31 [ibid: Recommendations on Indictments and Other Decisions \(hsk.gov.tr\)](#)
- 32 Şerife Ceren Uysal, "Nedim Türfent Indictment Report", PEN Norway Turkey Indictment Project, 5 August 2020, [PEN-Norway-Nedim-Turfent-Report-EN-1.pdf \(norskpen.no\)](#)
- 33 Şerife Ceren Uysal, "Deniz Yücel Indictment Report", PEN Norway Turkey Indictment Project, 29 October 2020, [Microsoft Word - Deniz Yucel\\_EN\\_AD.docx \(norskpen.no\)](#)
- 34 Şerife Ceren Uysal, "Ahmet Altan and Others Indictment Report", PEN Norway Turkey Indictment Project, 21 January 2021, [Microsoft Word - Ahmet Altan EN.docx \(norskpen.no\)](#)
- 35 Clarissa Fondi & Hannah Beck, "Özgür Gündem Raid Indictment Report", PEN Norway Turkey Indictment Project, 9 September 2021, [Microsoft Word - Özgür Gündem Hannah Clarissa 9 Sept ENFINAL.docx \(norskpen.no\)](#)
- 36 Heidi Heggdal, "Seyhan Avşar Oğuz Indictment Report", PEN Norway Turkey Indictment Project, 30 September 2021, [Microsoft Word - PEN-Norway-Turkey-Indictment-Project-Avşar\\_30-sept-2021\\_ENG.docx \(norskpen.no\)](#)
- 37 Clarissa Fondi & Hannah Beck, "Necla Demir Indictment Report", PEN Norway Turkey Indictment Project, 21 October 2021, [Turkey-Indictment-Project\\_21-October-2021\\_ENG.pdf \(norskpen.no\)](#)
- 38 Şerife Ceren Uysal, "Abdurrahman Gök Indictment Report", PEN Norway Turkey Indictment Project, 19 October 2023, [PEN-Norway\\_Legal-Report-on-Indictment-A-Gok-Eng.pdf \(norskpen.no\)](#)
- 39 Şerife Ceren Uysal, "Diyarbakır / Kurdish Journalist Indictment Report", PEN Norway Turkey Indictment Project, 7 November 2023, [PEN-Norway\\_Legal-Report-on-Indictment-Diyarbakir-journalist-Eng\\_amended.pdf \(norskpen.no\)](#)
- 40 Kevin Dent Q.C., "Gezi Trial Indictment Report", PEN Norway Turkey Indictment Project, 8 October 2020, [Microsoft Word - \(2\)Gezi Park\\_EN.docx \(norskpen.no\)](#)
- 41 Heidi Heggdal, "Pelin Ünker Indictment Report", PEN Norway Turkey Indictment Project, 17 December 2020, [Microsoft Word - Pelin Unker\\_EN.docx \(norskpen.no\)](#)
- 42 Aska Fujita, Q.C., "Cumhuriyet Davası İddianame İnceleme Raporu", PEN Norveç Türkiye İddianame Projesi, 2 Aralık 2020, [Microsoft Word - Cumhuriyet trial\\_TR.docx \(norskpen.no\)](#)
- 43 Heidi Heggdal, "Fincancı, Önderoğlu, Nesin Indictment Report", PEN Norway Turkey Indictment Project, 15

- October 2020, [Microsoft Word - Fincancı, Nesin and Önderoğlu EN.docx \(norskpen.no\)](#)
- 44 Clarissa Fondi & Hannah Beck, "Çapan, Aykan, Keskin Indictment Report", PEN Norway Turkey Indictment Project, 4 February 2021, [Microsoft Word - Reyhan Çapan, Hüseyin Aykol, Emire Eren Keskin EN.docx \(norskpen.no\)](#)
- 45 Vidar Strømme, "Bülent Şık Indictment Report", PEN Norway Turkey Indictment Project, 23 September 2021, [Microsoft Word - BülentŞıkTIP23.9.2021ENG.docx \(norskpen.no\)](#)
- 46 Heidi Heggdal, "Seyhan Avsar Oğuz Indictment Report", PEN Norway Turkey Indictment Project, 30 September 2021, [Microsoft Word - PEN-Norway-Turkey-Indictment-Project-Avsar\\_30-sept-2021\\_ENG.docx \(norskpen.no\)](#)
- 47 Jaantje Kramer & Stella Pizzato:, "Veysel Ok Indictment Report", PEN Norway Turkey Indictment Project, 7 October 2021, [Microsoft Word - VeyselOKTIP07.10.2021ENG.docx \(norskpen.no\)](#)
- 48 Kevin Dent Q.C., "Osman Kavala & Others The Gezi Park Trial Indictment Report", PEN Norway Turkey Indictment Project, 9 October 2020, [Microsoft Word - \(2\)Gezi Park EN.docx \(norskpen.no\)](#)
- 49 Heidi Heggdal, "Fincancı, Önderoğlu, Nesin Indictment Report", PEN Norway Turkey Indictment Project, 15 October 2020, [Microsoft Word - Fincancı, Nesin and Önderoğlu EN.docx \(norskpen.no\)](#)
- 50 Şerife Ceren Uysal, "Hikmet Tunç Kumli İddianame İnceleme Raporu", PEN Norveç Türkiye İddianame Projesi, 14 Ekim 2021, [Microsoft Word - Hikmet Kumli Tunç. TIP.14.10.21ENG.docx \(norskpen.no\)](#)
- 51 Clarissa Fondi & Hannah Beck, "Necla Demir Indictment Report", PEN Norway Turkey Indictment Project, 21 October 2021, [Turkey-Indictment-Project\\_21-October-2021\\_ENG.pdf \(norskpen.no\)](#)
- 52 Şerife Ceren Uysal, "MIT News Case Indictment Report", PEN Norway Turkey Indictment Project, 13 November 2020, [MIT-News-Case\\_EN-1.pdf \(norskpen.no\)](#)
- 53 Aska Fujita, Q.C., "Cumhuriyet Indictment Report", PEN Norway Turkey Indictment Project, 2 December 2020, [Microsoft Word - Cumhuriyet trial\\_EN\\_1Dec.docx \(norskpen.no\)](#)
- 54 Şerife Ceren Uysal, "Ahmet Altan and Others Indictment Report", PEN Norway Turkey Indictment Project, 21 January 2021, [Microsoft Word - Ahmet Altan EN.docx \(norskpen.no\)](#)
- 55 Şerife Ceren Uysal, "Hikmet Tunç Kumli Indictment Report", PEN Norway Turkey Indictment Project, 14 October 2021, [Microsoft Word - Hikmet Kumli Tunç. TIP.14.10.21ENG.docx \(norskpen.no\)](#)



- 56 Şerife Ceren Uysal, "Diyarbakır / The Trial of Kurdish Journalists Indictment Report", PEN Norway Turkey Indictment Project, 7 November 2023, [PEN-Norway Legal-Report-on-Indictment-Diyarbakir-journalist-Eng\\_amended.pdf \(norskpen.no\)](#)
- 57 Şerife Ceren Uysal, *ibid.*





**P E N  
N O R W A Y  
2023**