

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

Legal Report on Indictment

**18 lawyers registered with
the Istanbul Bar Association**

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PEN Norway Turkey Indictment Project:

PEN Norway's Turkey Indictment Project has been running since January 2020.

During that time, with an international team of judges, lawyers and academics we studied 29 indictments in cases involving freedom of expression. These include the prominent Cumhuriyet newspaper trial, the Büyükada human rights defenders' trial and the five-year Gezi Park trial.

Each report takes a single indictment and compares it to Turkey's domestic law and to international law. The deepening crisis in the rule of law in Turkey since 2016 has meant that not one indictment has yet met domestic procedural standards or the tenets set out in Article 6 of the European Convention on Human Rights, concerning the right to a fair trial.

With this in mind, we continue to work with leading human rights lawyers globally to study indictments in the cases of journalists, civil society actors and lawyers and will continue to make recommendations for training of judges and prosecutors and for the continuing improvement of the indictment writing process in Turkey.

The importance of this work was demonstrated in 2022 when the defendants in the Gezi Park trial were all convicted and jailed for long sentences based upon facts in an alarmingly inadequate and flawed indictment. The project continues in 2023.

All reports can be accessed via our website: www.norskpen.no

And the two final reports of 2020 and 2021 are available at:

2020: <https://norskpen.no/wp-content/uploads/2021/06/PEN-Norway-Turkey-Indictment-Project-Report-2020.pdf>

2021: https://norskpen.no/wp-content/uploads/2022/03/PEN-Norway-Turkey-Indictment-Project-Report-2021_Eng.pdf

Additionally, as part of the project, guidelines on indictment writing for prosecutors in Turkey has also been published, and the guidelines can be accessed here: [Guidelines-on-Indictment-Writing-for-Prosecutors-in-Turkey.pdf](https://norskpen.no/wp-content/uploads/2022/03/Guidelines-on-Indictment-Writing-for-Prosecutors-in-Turkey.pdf) (norskpen.no)

The project is conceived and led by PEN Norway's Turkey Adviser, Caroline Stockford and the indictment reports are supervised by PEN Norway's Legal Adviser on Turkey, human rights lawyer Şerife Ceren Uysal.

Legal Report on Indictment

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1. Introduction

This report is a part of PEN Norway's Turkey Indictment Project, and its purpose is to examine the indictment against 18 lawyers issued by the Chief Public Prosecutor's Office of Istanbul, on 15 December 2017 (with Investigation no. 2015/121624; Merits no. 2017/37442; Indictment no. 2017/6940). The evaluation will be conducted in accordance with Turkey's domestic law and international human rights law to determine whether the indictment adheres to these standards. The report is divided into three sections. Section 2 provides a brief summary of the background information on the case. Section 3 presents the legal analysis of the indictment. It assesses the indictment in light of international standards, in particular the European Convention on Human Rights (ECHR), the United Nations (UN) Guidelines on the Role of the Prosecutors and the UN Basic Principles on the Role of Lawyers. Finally, section 4 offers a few selected recommendations.

2. Summary of Case and Background Information

In 2015, curfews were declared in the Kurdish-majority provinces of Southeastern Turkey, including Şırnak's Cizre district. During this time, people living in the region were cut off from the outside world, without any electricity, water, and healthcare services. There were dozens of lives lost due to these sanctions. Because of these events, on 15 September 2015 around 200 lawyers affiliated with the Istanbul Bar Association attempted to organize a protest march in Taksim Square / Istiklal Avenue, considered the heart of Istanbul. When this was not permitted, the lawyers staged a sit-in

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protest against state actions in Cizre. They received warnings from law enforcement agencies; however, they proceeded to unfurl a banner and chant slogans condemning state actions. The protest also included speeches accusing the state of war crimes and human rights violations. After concluding their statements, they dispersed. There were no incidents that occurred; the protest was entirely peaceful.

More than two years later, 18 out of approximately 200 lawyers present received an indictment, charging them with “disseminating propaganda in favor of a terrorist organization”, as defined by Article 7/2 of the Counter-terrorism Law No. 3713. The case was then heard before two different High Criminal Courts in Istanbul. Although the lawyers were acquitted in the trial, the proceedings lasted for years.

The indictment does not specify the conduct of the 18 lawyers. In particular, the indictment does not mention anything about the specific conduct of which the indicted lawyers are accused, nor does the indictment provide any arguments as to why this conduct should be imputed to the individual lawyers indicted.

3. Analysis of the Indictment

3.1 The right to a fair trial (Article 6 ECHR)

3.1.1 Introduction

Article 6, section 1, of the European Convention on Human Rights (ECHR) reads:

“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.”

The right to a fair trial is enshrined in this article, which is essential in establishing the rule of law. The article comprises several fundamental guarantees to ensure that every person charged with a criminal offense is given a fair hearing, within a reasonable time, and by an independent and impartial tribunal established by law.

3.1.2 The length of proceedings

Essential to the case at hand, the ECHR requires cases to be heard within a “reasonable time”. Accordingly, the relevant period begins from the moment the action was instituted before the competent court,¹ and the period ends when the whole of the proceedings is over.²

Whilst there is no exact number of years set by the ECtHR, previous case law has established that exceeding “reasonable time” is only excused if the case is complex.³ This complexity includes, for instance, if there are multiple charges involved or if the case is large-scale and requires investigations in several countries.⁴ In *Neumeister v. Austria*, the ECtHR ruled that a case of nine years and seven months exceeded the “reasonable time” requirement, as it had no other complexity than the number of people involved (35).⁵ However, a case of over five years regarding international money laundering, which required global investigations and financial expertise was regarded as complex, and therefore did not exceed the “reasonable time” requirement.⁶ Thus, the complexity of the case is a determining element for whether “reasonable time” was exceeded or not. Moreover, this shows that the ECtHR underlines the importance of administering justice without delays which might jeopardize its effectiveness and credibility.⁷

In this case, it is essential to first highlight the timeline of the indictment. The alleged offense took place on the 15th of September 2015, and the indictment was only issued on the 15th of December 2017. Therefore, the indictment took two years and two months to be delivered. Along with concerns about a fair trial, such late indictments likely undermine the credibility of the court and the principle of legal

certainty, as they may lead to public uncertainty about potential prosecutions.

Moreover, although the lawyers were acquitted in trial, the proceedings lasted several years. The Istanbul 36th High Criminal Court announced its verdict on the 22nd of February 2022, while the Istanbul 13th High Criminal Court reached a verdict on the 30th of November 2023. Even though the lawyers were acquitted, the proceedings still lasted for around eight years. As established by *Neumeister v. Austria*, the mere number of lawyers in the indictment (18) does not make this a complex case. Furthermore, it is likely that the case in question did not require complex, large-scale investigations in multiple countries nor was specific expertise required.⁸ Therefore, eight years for the entirety of the proceedings is disproportionately long and cannot be a “reasonable time” for the case to have taken place. Therefore, the length of the proceedings in this case is a violation of Article 6(1) ECHR.

3.1.3 The clarity of the indictment

Article 6, section 3(a) ECHR further states that those charged with a criminal offense must be informed promptly, in a language which they understand and in detail, of the nature and cause of the accusation against them. In the preceding paragraph it has already been argued that the present indictment has exceeded the reasonable time requirement. Therefore it is submitted here that the requirement of informing promptly has also not been met. This also applies to the other guarantees Article 6, section 3(a) ECHR, for the following reasons.

The extent of “detailed” information varies depending on each case; however, the accused must at least be provided with sufficient information to fully understand the extent of the charges against them, to prepare an adequate defense.⁹ This information is “detailed” when the offenses the defendant is accused of are sufficiently listed; the place and date of the offense is stated; there is a reference to the relevant Articles of the Criminal Code; and the name of the victim is mentioned.¹⁰ Moreover, the “cause” of the accusation refers to the acts they are alleged to have committed and on which the accusation is based, and the “nature” refers to the legal characterization given to those acts.¹¹

Whilst the indictment contains the elements for it to be “detailed”, it is unclear which lawyers exactly communicated certain statements that subsequently led to their accusation. The indictment states that the lawyers delivered speeches on behalf of the group and that they submitted a written statement to the press and police; nevertheless, the indictment does not specify which lawyers delivered such speeches or statements. Thus, the document cannot be classified as having “detailed” information.

Furthermore, even though the lawyers in the indictment speak Turkish, the indictment is difficult to comprehend due to its poor grammar and organization. Much of the indictment explains the PKK/KCK and a description of the speeches delivered by the lawyers during the protest. The indictment further contains biased and leading language; for instance, it states that the lawyers’ written statement to the press was “misleading and divisive”.¹²

“ The indictment took two years and two months to be delivered. Along with concerns about a fair trial, such late indictments likely undermine the credibility of the court and the principle of legal certainty, as they may lead to public uncertainty about potential prosecutions. ”

Therefore, the indictment does not thoroughly and objectively evaluate the actions committed by the lawyers, and how those actions have caused them to breach Article 7(2) of the Counter-terrorism Law numbered 3713. Thus, the lack of clarity of the indictment constitutes a violation of Article 6(3)(a) ECHR.

Furthermore, it is established case law of the ECtHR that there can be no criminal conviction nor a penalty unless *personal* liability for an offence has been established in accordance with the law.¹³ Underlying this case law are the principle of the presumption of innocence and the principle of legality, according to which no penalty may be imposed on a person without a finding of personal liability. Similarly, no one can be held guilty of a criminal offence committed by another. However, the indictment fails to establish a criminal offence and fails to establish personal (criminal) liability of the lawyers indicted. The lack of clarity as to the specific conduct of which the indicted lawyers are accused and the complete lack of arguments as to why this conduct should be imputed to the individual lawyers indicted is a clear breach of the relevant articles of the ECHR and a violation of the underlying fundamental principles of procedural and substantive fairness: the principle of the presumption of innocence and the principle of legality.

Conclusions

It follows that the entirety of the proceedings in question is a violation of Article 6 ECHR. This is because:

- The length of the proceedings did not take place within a “reasonable time”, .
- The indictment lacks clarity in terms of grammar, organization, and thorough evaluation of the nature and crime in question.
- The conduct of the 18 lawyers is not specified, hence violating the fundamental principles of presumption of innocence and principle of legality.

3.1.4 Recommendations

In line with the above analysis, future indictments can be improved by ensuring that they are issued in a timely manner, and that the whole of the proceedings must take place within a “reasonable time”. In future cases, Turkey’s prosecutors should take into account whether future cases may be complex in relation to ECtHR case law. If it is not, then they are likely violating the “reasonable time” requirement under Art. 6(1) ECHR.

Moreover, the indictment should be clear; it should outline the nature and cause of the accusation against whom the indictment is issued – rather than merely being descriptive of the events that occurred. The sentences should further be concise, rather than each sentence being around ten lines long, as seen in previous analyzed indictments.¹⁴ By taking into account such recommendations of issuing the indictment and conducting the proceedings within reasonable time, and writing a clear indictment, Turkey’s authorities are least likely to breach fundamental human rights.

3.2 The freedom of expression (Article 10 ECHR)

3.2.1 Introduction

Article 10, section 1, of the European Convention on Human Rights reads:

“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.”

The article enshrines the right to freedom of expression, which allows individuals to hold opinions without interference by the State. This right has been recognized as one of the essential foundations of a democratic society and a prerequisite for personal fulfillment and societal progress¹⁵ which underpins the protection of other rights.¹⁶

3.2.2 The alleged statements

To conduct a comprehensive assessment of the indicted lawyers' right to freedom of expression, it is necessary to analyze the statements for which they are being charged and the context in which they delivered them.

The indictment mentions the following facts underlying the indictment.

“ The indictment does not provide any information or argumentation as to why this speech should be imputed to the individual lawyers indicted. For that reason alone, this indictment violates fundamental principles of fairness. In addition, it will be argued below that the indictment violates the right to freedom of expression. ”

- Several of the approximately 200 lawyers present chanted slogans such as “You cannot be free alone, it is either all together or none of us, Resisting peoples are not alone, Biji berhadane Cizre [Kr. Long live the Cizre Resistance], Biji biratiye gelan [Kr. Long live the sisterhood of the people], Kurdish people will defy the extermination attempts, The murderer state will face the consequences, Everywhere is Cizre everywhere is resistance, AKP wants war and peoples want peace, ISIS is the Killer AKP is the accomplice, Long live revolutionary solidarity, Şehit namırın [Kr. Martyrs won't die] and AKP is the Killer ISIS is the accomplice”, that despite being warned by the law enforcement officers that slogans constituting a criminal offense were being shouted which should stop.
- Several of the approximately 200 lawyers present delivered speeches which are summarized in the indictment as follows: “In Cizre, violence was inflicted on the people of Cizre by the State, the people's natural needs such as electricity and water were cut off, water pipes were blown up by the State, municipality workers who went to repair them were detained by the police, bearded ISIS militants wearing police uniforms were roaming the streets of Cizre, helicopters were used to machine gun the houses of innocent people, the curfew in Cizre was unlawfully imposed to hide the oppression and torture experienced by the people of Cizre”.
- Several of the approximately 200 lawyers present participated in singing the hymn known as HERNEPEŞ, which, according to the indictment, “glorifies the PKK terrorist organization”, despite being told by officials to cease this singing immediately.
- Finally, the indictment mentions a press statement, which was delivered on behalf of the group by a lawyer named Züleyha GÜVEN, who is not among the lawyers indicted in the present case. Afterwards the statement was distributed to the press and the public. According to the indictment the statement contains “misleading and divisive remarks”. The statement appears to be cited in full in the indictment. We will refer to the relevant parts of the text in the sections below.

Legality and presumption of innocence

As mentioned before, the indictment does not provide any information or argumentation as to why this speech should be imputed to the individual lawyers indicted. For that reason alone, this indictment violates fundamental principles of fairness. In addition, it will be argued below that the indictment violates the right to freedom of expression.

Factual statements

Several of the statements mentioned in the indictment are factual statements of a general nature, stating for example i) that a curfew was ordered; ii) that electricity and water were cut off; iii) that people were injured and died, and iv) that homes and workplaces were destroyed. The statements are statements of fact that are very general in nature and therefore not of a controversial nature, based on facts that are available to anyone, and their truth was and is easily verifiable. According to established case law of the ECtHR such statements of facts fall within the freedom of expression and under the protection of Article 10, section 1, of the ECHR.¹⁷

Political debate

Furthermore, the demonstration of the group of 200 lawyers should be viewed within the wider public political debate about the events that took place in 2015 in Cizre and other parts of Southeastern Turkey. Many Turkish citizens participated in these debates, among them lawyers, academics, human rights groups, journalists and opposition politicians.¹⁸ The role of the government of Turkey in the events of 2015 has been criticized by many, among which were the 200 lawyers mentioned in the present indictment.

As to these forms of debate and criticism, the ECtHR has taken the view that in a democratic system the actions or omissions of the government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of public opinion. Consequently, the ECtHR has established that the limits of permissible criticism with regard to the Government are very wide.¹⁹ The threshold for restricting such criticism is very high and the margin of appreciation very narrow, as will be demonstrated below. The unsubstantiated assertion in the indictment that the indicted lawyers did “provoke the public”, “create a social uprising” or were “disseminating propaganda in favour of a terrorist organization” are entirely insufficient and cannot justify a restriction of the freedom of expression of the participants in the demonstrations.

3.2.3 Special protection for lawyers

The protection of the right to freedom of expression varies depending on the context in which it is exercised. In the case of lawyers, the ECtHR has recognized that they play a crucial role in the administration of justice, and thus, their right to freedom of expression is accorded special consideration and protection.²⁰ The ECtHR case law on Article 10 ECHR outlines that lawyers play a key role in ensuring that the courts, whose mission is fundamental in a State based on the rule of law, enjoy public confidence and recognize the unique position of lawyers in the administration of justice. Lawyers are key actors in the justice system, directly involved in its functioning.²¹

In the seminal case of *Morice v. France*²² the ECtHR elaborated on the high level of protection that is accorded to lawyers:

“The specific status of lawyers gives them a central position in the administration of justice as intermediaries between the public and the courts (...) Lawyers are thus entitled, in particular, to comment in public on the administration of justice, provided that their criticism does not overstep certain bounds. (...).

“ The demonstration of the group of 200 lawyers should be viewed within the wider public political debate about the events that took place in 2015 in Cizre and other parts of Southeastern Turkey. Many Turkish citizens participated in these debates, among them lawyers, academics, human rights groups, journalists and opposition politicians.

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The question of freedom of expression is related to the independence of the legal profession, which is crucial for the effective functioning of the fair administration of justice. It is only in exceptional cases that restriction – even by way of a lenient criminal penalty – of defence counsel’s freedom of expression can be accepted as necessary in a democratic society.”²³

In the *Morice* case, the ECtHR emphasized that restrictions of the right to freedom of expression were reserved for “gravely damaging attacks that are essentially unfounded”, which had not been made in the case.²⁴

Furthermore, when the matter in question concerns public interest, it is established case law of the ECtHR that:

“[A] high level of protection of freedom of expression, with the authorities thus having a particularly narrow margin of appreciation, will normally be accorded where the remarks concern a matter of public interest (...). A degree of hostility and the potential seriousness of certain remarks do not obviate the right to a high level of protection, given the existence of a matter of public interest.”²⁵

It follows from the above that the statements were fully covered by the freedom of expression as protected by Article 10, section 1, of the ECHR. Therefore, the present indictment and prosecution are a direct violation of this right by the Turkish State.

3.2.4 (Un)lawful restrictions to Article 10

Article 10, section 2, ECHR sets out the circumstances under which States may restrict the right to freedom of expression. Three assessment criteria are used to determine whether such restriction does or does not violate the right to freedom of expression. A restriction must be “prescribed by law”, it must pursue “a legitimate aim” within the meaning of Article 10, section 2, and, lastly, a restriction must be “necessary in a democratic society”.

In the majority of cases, it is the latter question that determines the outcome of a given case.²⁶ In its case law, the ECtHR has developed the autonomous concept of whether the interference is “proportionate to the legitimate aim pursued”. As a general principle, the “necessity” of any restriction must be convincingly established, and the restriction must be relevant, sufficient, and proportionate to its intended purpose.

In the 2017 *Beslan School Siege case*, the ECtHR held that States have the right to take preventative measures to prevent terrorism or the incitement of violence. However, States must discharge these obligations in a manner that respects human rights and the rule of law, including the freedom of expression.²⁷ Thus, the principles regarding freedom of expression also apply to measures taken to safeguard national security and public safety as part of counter-terrorism efforts. To impose limitations based on national security, the perceived risk must not be theoretical or vague. The risk must involve at least a “reasonable risk of serious disturbance” to the public order in a democratic society. Only then can a restriction on freedom of expression be deemed reasonable and lawful.

To determine this, the ECtHR “look[s] at the interference in the light of the case as a whole to determine whether the restriction is proportionate, including the content of the impugned statements and the context in which they were made”.²⁸ For crimes of expression to be prosecuted it is essential to establish a direct connection between the words spoken and the actual and intended harm or risk posed. If there is no reasonable relationship between the individual’s expression and the alleged harm or risk, then the link is too remote to establish individual responsibility.²⁹

Also relevant to the present case is the case of *Ali Gürbüz v. Turkey*.³⁰ It also involved restriction of the freedom of expression and prosecution under Turkey’s Anti-Terrorism Law no. 3713. In this case, Mr Gürbüz had criminal proceedings brought against him for publishing statements by the leaders of organizations characterized as terrorist under Turkish law. These messages did not call for any violence, armed resistance or uprising, and did not constitute any hate speech.

The ECtHR held that if a State initiates criminal proceedings against individuals for publishing statements, without considering the content of these statements or their contribution to public debate, they can be seen as attempting to use criminal law to (systematically) suppress such publications. The ECtHR finds this is incompatible with the freedom to receive or impart information and ideas.³¹ Therefore, the court decided that the impugned measure did “not meet a pressing social need, that it was by no means proportionate to the legitimate aims sought to be achieved and that, therefore, it was not necessary in a democratic society.”³² Consequently, the ECtHR held that Turkey had violated Article 10 of the ECHR.

“Several of the statements mentioned in the indictment are factual statements of a general nature, which are publicly available and can be easily verified. Such statements are protected by Article 10, section 1, and cannot be restricted under Article 10, section 2, ECHR.”

3.2.5 Conclusions

It follows from the above, and it is submitted here, that the restriction of the freedom of expression violates the right to freedom of expression and is not permitted by Article 10, section 2, ECHR.

- Several of the statements mentioned in the indictment are factual statements of a general nature, which are publicly available and can be easily verified. Such statements are protected by Article 10, section 1, and cannot be restricted under Article 10, section 2, ECHR.
- Other statements were part of a wider public political debate in which the government of Turkey has been criticized by many within Turkey. None of these statements can be qualified as ‘gravely damaging attacks that are essentially unfounded’. The unsubstantiated accusations in the indictment that the peaceful demonstration “provoked the public”, “created a social uprising” or “disseminated propaganda in favour of a terrorist organization” cannot change this conclusion. Therefore, the lawyers were entitled to protection granted by Article 10, section 1, ECHR and the statements made during the demonstration cannot be restricted under Article 10, section 2, ECHR.
- The protection of Article 10 and the threshold for restricting the freedom of expression is even higher for the indicted persons in the present case, as they were lawyers addressing a matter of public interest.

3.3 The freedom of assembly (Article 11 ECHR)

3.3.1 Introduction

Article 11, section 1, of the ECHR reads:

“Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.”

This article provides for the freedom of assembly and association for the protection of their interests.³³ This freedom can only be restricted if it is necessary in a democratic society, in the interests of national security or public safety.³⁴

3.3.2 Peaceful assembly

Article 11 ECHR only protects the right to peaceful assembly; it does not cover a demonstration where the participants act violently or have violent intentions.³⁵ The guarantees of Article 11 thus apply to all demonstrations, except for those where participants incite violence or otherwise reject the foundations of a democratic society.³⁶ In order to establish whether the applicant may invoke the protection of this article, the Court considers (i) whether the assembly intended to be peaceful and whether the organizers had violent intentions; (ii) whether the applicant had demonstrated violent intentions when joining the assembly; and (iii) whether the applicant had inflicted bodily harm on anyone.³⁷

In *Oya Ataman v. Turkey*, Ataman peacefully protested against prison conditions in Turkey. Even though there was no threat to public order, Turkish authorities subjected Ataman and several of her colleagues to arbitrary arrest and repelled them with pepper spray. The ECtHR found this to be a violation of Article 11 ECHR.

Similarly, the lawyers in this case were peacefully protesting. They left of their own accord without any violence necessary, hence demonstrating they did not have violent intentions. Nevertheless, the indictment orders the lawyers' imprisonment and deprivation of certain rights. Analogously to *Oya Ataman v. Turkey*, this would amount to a violation of the right to peaceful assembly under Article 11 ECHR.

3.3.3 Sanctions

Article 11 further establishes that if the sanctions imposed on the demonstrators are criminal in nature, they require particular justification.³⁸ A peaceful demonstration should not, in principle, be rendered subject to the threat of a criminal sanction³⁹, and notably to deprivation of liberty.⁴⁰ Thus, the court must carefully analyze with scrutiny the cases where sanctions imposed by the national authorities for non-violent conduct involve a prison sentence.⁴¹

In this case, the indictment orders that in case of the lawyers' conviction to imprisonment, they should be deprived of certain rights. However, as their demonstration was peaceful, such punishment requires proper justification in the indictment, in which the prosecution has the burden of proof.

Moreover, in *Kemal Çetin v. Turkey*, the ECtHR established that a penalty for shouting slogans and holding banners during a demonstration due to their content is considered an interference with the right to freedom of peaceful assembly under Article 11.⁴² In this case, the demonstration included slogans and signs praising the PKK; however, the ECtHR ruled that using slogans and signs considered illegal by Turkey cannot justify the suppression of the applicant's right to demonstrate.⁴³

The indictment at hand describes in detail the slogans stated and banners held by the lawyers during the demonstration. For instance, the slogan "We will stop the war, massacres and dictatorship" was said; and banners with the words "We will stop the War, Massacres, Dictatorship, Long Live the Sisterhood of Peoples" were unfurled.

“ The lawyers in this case were peacefully protesting. They left of their own accord without any violence necessary, hence demonstrating they did not have violent intentions. Nevertheless, the indictment orders the lawyers' imprisonment and deprivation of certain rights. ”

The legal evaluation and conclusion of the indictment clearly state that the banners and slogans amount to the crime of disseminating propaganda in favor of a terrorist organization, and therefore contribute to the lawyers' potential conviction. However, as shown in *Kemal Çetin v. Turkey*, the fact that such words are considered illegal by the Turkish authorities does not justify suppressing the right to assembly. Accordingly, such a penalty is incompatible with Article 11 ECHR.

3.3.4 (Un)lawful restrictions to Article 11

Article 11, section 2, ECHR sets out the circumstances under which States may restrict the right to freedom of assembly and association. Three assessment criteria are used to determine whether such restriction does not violate the right. A restriction must be "prescribed by law", it must pursue "a legitimate aim" within the meaning of Article 11, section 2, and, lastly, a restriction must be "necessary in a democratic society". As is the case with the right to freedom of expression as outlined in the previous paragraph, in the majority of cases it is the latter question that determines the outcome of a given case.⁴⁴

The ECtHR usually accepts that the measures in question pursued a legitimate aim if they are for "prevention of disorder" or "the protection of the rights of others" or both.⁴⁵ However, if the aim is irrelevant, the ECtHR will likely reject it. In *Navalnyy v. Russia*, the Court did not accept the aim of prevention of disorder in events where the gatherings caused no nuisance.⁴⁶ Similarly, as the protest in this case was entirely peaceful, it is likely that the Turkish courts cannot evoke the justification of "legitimate aim" for attempting to stop the demonstration and indicting the lawyers.

To determine whether the measures in question were necessary in a democratic society, the ECtHR established that the Contracting States enjoy a certain but not unlimited margin of appreciation.⁴⁷ In *Akgöl and Göl v. Turkey*, the ECtHR stated that a peaceful demonstration should not, in principle, be rendered subject to the threat of a criminal sanction.⁴⁸ The Court thus ruled that the interference with the applicants' rights under Article 11 was disproportionate and unnecessary for preventing disorder within the meaning of section 2. Since the lawyers in this case faced the threat of a criminal penalty, it is likely that the Turkish courts cannot justify their actions as a necessity in a democratic society. As a consequence, the present indictment and criminal proceedings constitute a non-justified restriction to the right to freedom of peaceful assembly and to freedom of association with others.

3.3.5 Conclusions

It follows from the above that the indictment issued is a violation of Article 11 ECHR. This is because:

- The lawyers in the demonstration were entirely peaceful and did not engage or incite any act of violence; hence, they were entitled to the full protection of Article 11 ECHR .
- The indictment involves the threat of criminal sanctions, which is incompatible with Article 11 ECHR, as the protest was entirely peaceful, and such sanctions cannot be imposed due to banners raised or slogans stated during the demonstration.
- The interference cannot be said to have a legitimate aim", nor were they "necessary in a democratic society" within the meaning of Article 11, section 2, ECHR.

3.4 Limitation on use of restrictions on rights (Article 18 ECHR)

Article 18 ECHR reads as follows: "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". This article limits the use of restriction on rights and empowers the Court to investigate whether criminal prosecutions have been perverted into instruments of suppression going beyond the surface of measures that could apparently seem legitimate.⁴⁹ Article 18 has an auxiliary function, meaning that it is a non-autonomous provision, that can only be invoked in conjunction with another Convention right, which has to be a qualified right subject to restrictions. However, a violation of Article 18 can still be found regardless of whether the right that was invoked in connection with it was not violated.

As it emerged from two recent cases from the ECtHR, *Demirtaş v. Turkey* (no. 2) [GC] and *Kavala v. Turkey*, the Court observed an ongoing pattern of oppression of political dissent, human rights defenders, journalists and lawyers in Turkey. In both cases the Court found a violation of Article 18 ECHR.

In *Demirtaş*, the Court stated that:

“[I]t has been established beyond reasonable doubt that the applicant’s detention, especially during two crucial campaigns relating to the referendum and the presidential election, pursued the ulterior purpose of stifling pluralism and limiting freedom of political debate, which is at the very core of the concept of a democratic society.”⁵⁰

“ Considering the broader context in which the present indictment was issued, we can see a pattern of oppression of dissent in Turkey that provokes a chilling effect on various rights protected by the Convention, including the right to freedom of expression and the freedom of assembly, and causes the deterioration of the rule of law.

This judgment highlights the ulterior purpose behind *Demirtaş*’s deprivation of liberty and the Court ordered his immediate release providing “an unequivocal solution to the protracted political crisis in Turkey concerning the fate of Selahattin Demirtaş and other opposition politicians and dissidents in general”.⁵¹ The significance of the Grand Chamber judgment cannot be understated; it sends a powerful and clear message to the government that has the duty to recognise and protect the freedoms that political dissidents enjoy in a democratic society governed by the rule of law.

Similarly, in *Kavala*, the Court concluded that the “restriction of the applicant’s liberty was applied for purposes other than bringing him before a competent legal authority” and that:

“[T]he prosecution’s attitude could be considered such as to confirm the applicant’s assertion that the measures taken against him pursued an ulterior purpose, namely to reduce him to silence as an NGO activist and human-rights defender, to dissuade other persons from engaging in such activities and to paralyse civil society in the country.”⁵²

“ As it has been observed by many, the targeted harassment of human rights defenders in Turkey is part of a wider practice of arbitrary detentions and abusive prosecutions of journalists, elected politicians, lawyers, and other perceived government critics. This practice has been well- documented in many reports by the Council of Europe, the European Union, and human rights organizations.”⁵³

Considering the broader context in which the present indictment was issued, we can see a pattern of oppression of dissent in Turkey that provokes a chilling effect on various rights protected by the Convention, including the right to freedom of expression and the freedom of assembly, and causes the deterioration of the rule of law. Therefore, it is argued that the present indictment was issued with the purpose of silencing the indicted lawyers, in their capacity of prominent figures tasked with upholding the rule of law by advocating for human rights in Turkey through the exercise of the right to freedom of speech

3.5 UN Basic Principles on Role of Lawyers

In analysing the indictment, attention must be paid to the UN Basic Principles on the Role of Lawyers.

The United Nations Basic Principles on the Role of Lawyers (the “UN Basic Principles”)⁵⁴ are an instrument developed within the framework of the United Nations in 1990. It is the only international instrument which sets out principles that underlie and safeguard the practice of the legal profession.⁵⁵

The UN Basic Principles do not create legal obligations in the same vein as a treaty would. However, some of these principles are binding on States by virtue of the interpretation (by regional tribunals) of human rights treaties, as well as through binding domestic case law.

The UN Basic Principles refer to a broad range of issues, such as entry into the profession and access to counsel. However, some of its most important and often cited principles (16-18, 23 and 24) refer to the independence of the legal profession, understood as the ability of lawyers to practice their profession without intimidation, hindrance, harassment, or improper interference. Of these core principles, the following are especially relevant in the present case.

Principle 23, “Freedom of expression and association”, merits close consideration:

“Lawyers like other citizens are entitled to freedom of expression, belief, association and assembly. In particular, they shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights and to join or form local, national or international organizations and attend their meetings, without suffering professional restrictions by reason of their lawful action or their membership in a lawful organization. In exercising these rights, lawyers shall always conduct themselves in accordance with the law and the recognized standards and ethics of the legal profession.”

As argued extensively in this report, the authorities have grossly violated the freedom of expression and the freedom of assembly of the indicted lawyers. In doing so, Principle 23 of the UN Basic Principles was violated.

3.6 UN Guidelines on the Role of Prosecutors

Principles 10 to 20 in the UN Guidelines on the Role of Prosecutors (UN Guidelines)⁵⁶ outline the role of the prosecutors in criminal procedures.

According to Principle 12 UN Guidelines:

“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”.

Due to the inexcusable length of the proceedings, the flawed arrest and indictment; and because of the flagrant breach of the rights to freedom of expression and assembly, the decision to prosecute the indicted lawyers, the indictment itself, and the ensuing proceedings were not in line with this Principle 12, which accordingly has been breached by the prosecution in the present case.

Principle 13/a of the UN Guidelines states that in the performance of their duties, prosecutors should:

“Carry out their functions impartially and avoid all political, social, religious, racial, cultural, sexual or any other kind of discrimination”.

It seems apparent that the reason for the indictment and criminal prosecution of the lawyers in this case was of a political nature. This indicates that the indictment is lacking impartiality and could be politically motivated and the result of political discrimination.

Principle 14 of the UN Guidelines states:

“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.”

Principle 23 of the UN Guidelines states:

“Prosecutors shall respect the present Guidelines. They shall also, to the best of their capability, prevent and actively oppose any violations thereof.”

Given these two Principles, and given the circumstance that the present indictment and prosecution constitutes various breaches of these Guidelines by the prosecution, the continuation of the proceedings against the indicted lawyers would amount to a protracted breach of these Guidelines by the prosecution and should therefore not be allowed.

4. Conclusion and Recommendations:

In light of the foregoing, we conclude that the criminal charges brought against the 18 lawyers that were indicted in the present proceedings fail to comply with Turkey’s obligations under international and European human rights law, in particular the right to a fair trial, the right to freedom of peaceful assembly and to freedom of association with others and the right to freedom of expression. As such, the charges constitute an unlawful restriction on the right to freedom of expression under the Articles 6, 10 and 11 of the ECHR. It follows that, should the lawyers be convicted, their conviction would equally constitute an unnecessary interference with the right to freedom of expression. Also, this indictment and the procedure violate Article 18 of the ECHR as it deliberately restricts the rights and freedoms the present lawyers have under the ECHR. Finally, this indictment contravenes the UN Basic Principles on the Role of Lawyers as well as the UN Guidelines on the Role of Prosecutors.

In the light of all these considerations, the most fundamental recommendation that can be given to the judicial authorities of Turkey would be to adopt the application of international law to which Turkey is a party as a priority principle, regardless of the characteristic of the case before them. ■

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Endnotes:

- 1 Poiss v. Austria, § 50; Bock v. Germany, § 35
- 2 König v. Germany, § 98
- 3 Neumeister v. Austria, 1968, § 20
- 4 Ibid.; Arewa v. Lithuania, 2021, § 52
- 5 Milasi v. Italy, 1987, §§ 14-20
- 6 C.P. and Others v. France, 2000, § 30
- 7 H. v. France, § 58; Katte Klitsche de la Grange v. Italy, § 61 ECtHR
- 8 See C.P. and Others v. France, 2000, § 30, H. v. France, § 58; Katte Klitsche de la Grange v. Italy, § 61 ECtHR
- 9 Mattoccia v. Italy, 2000, § 60
- 10 Brozicek v. Italy, 1989, § 42
- 11 Mattoccia v. Italy, § 59; Penev v. Bulgaria, §§ 33 and 42
- 12 Indictment, page 5
- 13 This follows from Article 5, section 1 a, Article 6, section 2, and Article 7, section 1, ECHR. See e.g. Vervara v. Italy, 29 October 2013, no. 17475/09, par 69; Engel and Others v. Netherlands, 8 June 1976, § 68, Series A no. 22; Guzzardi v. Italy, 6 November 1980, § 100, Series A no. 39.
- 14 PEN Norway Guideline for Prosecutors, p. 26
- 15 Dichand and Others v Austria, no 29271/95, Judgment of 26 February 2002, par. 37; Handyside v. United Kingdom, 7 Eur. Court H.R. 413 (1976).
- 16 "Guide on Article 10 of the European Convention on Human Rights Freedom of Expression" (Council of Europe, ECtHR 2022) (hereinafter "Guide on Article 10").
- 17 See e.g. Oberschlick v Austria (GC) 23 mai 1991, no. 11662/85. See also Guide on Article 10, par 202 ff.
- 18 See e.g. the reports of "Academicians for Peace" (<https://barisicinakademisyenler.net/node/1>); The Cizre Report of the HDP ([HDP Cizre Report.pdf](https://hdp.org.tr/wp-content/uploads/2018/03/free_expression_guide-eng.pdf)); the report of Lawyers for Lawyers (<https://lawyersforlawyers.org/wp-content/uploads/Cizre-The-Curfow-Report.pdf>) and the further sources mentioned therein.
- 19 See the case law in: Guide on Article 10, par. 249 ff.
- 20 Sarah Maguire, Ishaani Shrivastava, "Freedom of Expression and Its Relationship with the Right to Respect for Private Life and the Right to a Fair Trial," March 2017, https://rolplatform.org/wp-content/uploads/2018/03/free_expression_guide-eng.pdf.
- 21 Guide on Article 10, par. 468 ff.
- 22 Morice v. France, no. 29369/10, Judgment of 23 April 2015 [GC].
- 23 Ibid. par 132-135.
- 24 Ibid. par 168.
- 25 Guide on Article 10, par. 488-492.
- 26 Guide on Article 10, par. 488-492.
- 27 Tagayeva and Others v. Russia, no. 26562/07, Judgment of 13 April 2017.
- 28 Ibid.
- 29 Ibid
- 30 Ali Gürbüz v. Turkey, no. 52497/08, Judgment of 12 March 2019.
- 31 Ibid. par. 77.
- 32 Ibid. par 78
- 33 Article 11(1) ECHR
- 34 Article 11(2) ECHR
- 35 Guide to Article 11, page 10
- 36 Kudrevicius and Others v. Lithuania [GC], 2015, § 92
- 37 Gülcü v. Turkey, 2016, § 97; and Shmorgunov and Others v. Ukraine, 2021, § 491
- 38 Rai and Evans v. the United Kingdom (dec.), 2009
- 39 Akgöl and Göl v. Turkey, 2011, § 43
- 40 Gün and Others v. Turkey, 2013, § 83
- 41 Taranenko v. Russia, 2014, § 87
- 42 Kemal Çetin v. Turkey, 2020, § 26
- 43 Kemal Çetin v. Turkey, 2020, § 35-39
- 44 Guide on Article 11, par. 48 f.
- 45 Guide on Article 11, par. 62
- 46 Navalnyy v. Russia [GC], 2018, §§ 124-126
- 47 Barraco v. France, 2009, § 42
- 48 Akgöl and Göl v. Turkey, 2011, § 43
- 49 Helmut Satzger, Frank Zimmermann, Martin Eibach, "Does Art 18 ECHR grant protection against politically motivated criminal proceedings? Rethinking the interpretation of Art 18 ECHR against the background of new jurisprudence of the European Court of Human Rights", EuCLR 4, no. 3 (2014), 106-112.
- 50 Selahattin Demirtaş v. Turkey (No. 2)[2020] application no. 14305/17 (ECtHR), para 437.
- 51 A Judgment to Be Reckoned with: Demirtaş v. Turkey (no. 2) [GC] and the ECtHR's Stand Against Autocratic Legalism" (Strasbourg Observers, 2021), accessed June 10, 2024, <https://strasbourgobservers.com/2021/02/05/a-judgment-to-be-reckoned-with-demirtas-v-turkey-no-2-gc-and-the-ecthrs-stand-against-autocratic-legalism/>; also: Başak Çalı, "The Whole Is More than the Sum of its Parts The Demirtaş v Turkey (No 2) Grand Chamber Judgment of the ECtHR" (Verfassungsblog, 2020), accessed June 10, 2024, <https://verfassungsblog.de/the-whole-is-more-than-the-sum-of-its-parts/>.

52 "Turkey: Release Osman Kavala" (International Commission of Jurists, 2020), accessed
June 7, 2024, <https://www.icj.org/turkey-release-osman-kavala/>; Kavala v. Turkey [2020]
application no. 28749/18 (ECtHR), paras 224-230.
53 Id.
54 <https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-role-lawyers>.
55 At a regional level in Europe, recommendations issued by the Committee of Ministers
of the Council of Europe "on the freedom of exercise of the profession of lawyer"
specifically address the legal profession" (<https://www.coe.int/en/web/cdcj/cj-av>).
56 <https://www.ohchr.org/en/instruments-mechanisms/instruments/guidelines-role-prosecutors>.