Indictment Review by Professor Helen Duffy[1]

Indictment No 2022/8895 (Suspect Rasime Sebnem Fincanci) before the High Criminal Court of Ankara

16 June 2023

Introduction and Overview

This report contains my review and assessment of Indictment No 2022/8895, filed against Rasime Şebnem Fincancı Korur on 26-27/10/2022. Dr Fincancı is a medical expert and human rights advocate in Turkey. She was formerly the President (and is now a member of the executive board) of the Human Rights Foundation of Turkey (TIHV) and President of the Turkish Medical Association. She is an academic at Istanbul University.

According to the indictment, on 19 October 2022, Dr. Fincancı was interviewed by Medya Haber TV. The interview is described as having been broadcast live, during a popular evening news bulletin. She was asked to comment on a video that was shown during the programmein the context of allegations of the use of chemical weapons by the Turkish military in northern Iraq. During the interview, in response to questions by the host and having seen the video, Dr Fincancı allegedly opined that toxic, chemical and poisonous gases had been used and that these allegations should be investigated in line with human rights standards. Her credentials appeared under her name, as is normal in such interviews. The indictment indicates that during her interview images of persons apparently killed by the chemical weapons in question were shown by Haber TV, that the deceased were PKK members and that subtitles referred to them as 'massacred' and 'guerrillas'.

On this basis, Dr Fincancı is charged with disseminating propaganda in favour of a terrorist organisation, under Article 7/2 of the Anti-Terror Law in light of Articles 53, 58/9, and 63 of the Turkish Penal Code, Article 325/1 of the Code of Criminal Procedure.

I have been asked to advise on the compatibility of this indictment - and by implication of the prosecution of the accused on the basis set out in the indictment - with international and European standards applicable to Turkey. It is understood that this expert opinion may be relied upon by the defendant in the case currently pending against her before the High Criminal Court of Ankara.

As will be set out and explained in full below, my assessment is that this indictment raises multiple extremely serious human rights concerns and is, on its face, incompatible with international human rights law (IHRL) standards binding on Turkey. These include in particular a violation of freedom of expression, of the principle of legality *nullum crimen sine lege* and of fair trial standards - including the rights to a strict and foreseeable application of

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criminal law and to be notified in detail of charges. It is my assessment that a review of this indictment leads to the inevitable conclusion that the prosecution of Şebnem Fincancı, on the basis of her television interview on the question of the alleged use by Turkey of chemical weapons, is an abuse of criminal process and a violation of IHRL. It also raises important questions regarding prosecutorial independence.

This review addresses the following key human rights concerns:

- Section 1 addresses concerns regarding *nullum crimen sine lege* and fair trial standards regarding notification of offences:
    - first, review of the factual basis for criminal charges, as set out in the indictment, and of the law in question, reveals a fundamental failure to identify how the alleged conduct and intent *of the accused* could give rise to individual responsibility for the crime charged (disseminating terrorist propaganda); put simply, the indictment does not clearly allege, still less support, her individual responsibility for the elements of the crime charged, as defined in law.
    - second, the scope, lack of clarity and specificity of the crime of propagandizing for terrorism, and in particular the unforeseeability of this crime as prosecuted in this case, raise additional concerns regarding the principle of legality.

- Section 2 addresses the related question of the compatibility of the indictment and prosecution of the accused with applicable international standards (in particular under the European Convention on Human Rights (ECHR) and ICCPR) in relation to freedom of expression (Article 10 ECHR, Article 19 ICCPR). While recognising freedom of speech can be restricted, and in exceptional circumstances criminalised, it notes that international standards indicate factors that should be taken into account in determining the lawfulness of such criminalisation. The content and context of the speech, and the lack of harm or danger resulting therefrom, point to this as a case of speech in the public interest, the prosecution of which violates free speech standards.

- Section 3 raises additional concerns in respect of compatibility with;
    - i) the right to private life (Article 8 ECHR);
    - ii) concerns regarding abuse of criminal prosecution for ulterior motives (Article 18 ECHR);
    - iii) other relevant international standards in relation to the protection of human rights defenders and academic freedom;
    - iv) the relevance of the ECHR obligations of the state to investigate.

- Section 4 ends by highlighting concerns regarding the relevance of evidence cited, evidence-gathering and questions concerning prosecutorial independence.

While the focus of this review - and the expertise of the author - relate to international standards, a few observations and questions regarding compatibility with Turkish law and procedure are also highlighted.

Section 1: Incompatibility of the Fincanci Indictment with basic principles of Criminal Law, *Nullum Crimen Sine Lege* and Fair Trial

i) The Facts and Law Set out in the Fincanci Indictment

The Crime alleged in the Indictment:

The indictment refers on p. 1 under 'applicable articles' to Art 7(2) of the Anti-terror law, alongside provisions of the Turkish penal code and the Code of Criminal Procedure. The criminal law provisions themselves are not set out in the indictment.

Research reveals that "Propaganda of Terrorist Organisation" under Art. 7/(2) of Anti-Terrorism Act (Law no. 3713), applied in the present case, reads as follows:

> "Any person who *disseminates propaganda* in favour of a terrorist organisation *by justifying, praising or inciting the use of methods constituting coercion, violence or threats* shall be liable to a term of imprisonment of one to five years." [2]

Article 7 of the Anti-Terror law on its face entails three cumulative elements: (1) the individual must *disseminate propaganda in favour of a terrorist organization*; (2) such dissemination must entail *legitimizing or condoning the methods of a terrorist organization*; (3) specifically those condoned methods must entail *violence, coercion, threats*.

This definition was introduced by amendment dated 30 April 2013,[3] by virtue of which the elements underlined above were added to Article 7/(2). The result was to limit the crime of propaganda to statements made to justify, praise or incite the methods of violence used by a terrorist organisation. It is noteworthy that the goal of this amendment was specifically to harmonise the scope of the offence with ECHR standards and prevent excessive limitations on the freedom of expression. This underscores that Article 7/(2) must be applied in accordance with the principles of freedom of expression as understood by the ECtHR, set out below, consistent with the intention of the legislature.

The facts alleged:

The allegations of fact in the indictment are vague and presented in a repetitive and circular fashion, such that their relevance to the charges is at best unclear. However, the allegations as set out in the indictment amount to the following:

- Dr Fincancı was interviewed by a particular media outlet (allegedly supportive of PKK).

[2] Anti-Terror Law, Art. 7

[3] Article 7/(2) of Law no. 3713 on the Fight against Terrorism in Turkey was amended on 30 April 2013 by Law no. 6459 to bring the provisions closer into line with the ECHR. According to the reasoning of the amendment of Article 7/(2) made by the Law no. 6459, "European Court of Human Rights finds that punishing individuals under Article 7 of the Anti-Terror Law due to their statements that do not contain any expression of encouragement to resort to violence or which do not qualify as incitement to armed rebellion is contrary to freedom of expression. The amendment which added certain qualifications in the offence is made in a view to making the scope of the offence "harmonized with ECHR standards" (Article 6).

- Dr Fincanci was shown a video of deceased PKK members, apparently killed by chemical weapons, and responded by stating that in her opinion toxic gases had been used, and that the issue "must be investigated within the scope of the Minnesota Protocol"[4].
- During her comments the media outlet allegedly showed images of deceased PKK members, referred to as "guerrillas" and it also showed Dr Fincancı's title.

The indictment does not precisely indicate why the impugned conduct of Dr Fincanci meets the elements of the crime of 'disseminating terrorist propaganda'. Indeed the facts as presented in the indictment do not appear to meet the definition of that crime under domestic law:

- There is no allegation or evidence presented that her statements referred to or condoned 'violence, coercion or threats' by a prescribed organisation, as explicitly required by the law.
- There is no evidence lead as to how her statements 'legitimised' or condoned (or intended to legitimise or condone) the *methods* of a terrorist organisation.
- The discussion in which Dr Fincancı participated did not relate to conduct or methods of violence or coercion of the PKK. Notably, the facts as alleged do not support the view that she made comments about the PKK or its methods at all. It does not appear in dispute that her comments addressed the conduct of, and allegations of use of chemical weapons by, the Turkish *state*, and called for investigation of what appeared to her to be serious allegations of use of chemical weapons by the state. The fact the state's operation was *against* alleged terrorists would be irrelevant to whether there should be an investigation as Dr Fincanci suggested (see below Section 3), and cannot conceivably transform comments about methods used by the Turkish state into a statement about the methods of the PKK.
- There is no allegation or evidence that the speech *incited violence*, or that it created a danger or proximate risk of such violence.
- There is no indication or allegation that the speech was *intended* to incite violence, or that it amounts to hate speech (see Section 2 below).
- There is no information provided as to how the defendant is deemed to have '*disseminated'* propaganda by being interviewed. There are multiple references to the images and language that were used by the media outlet during her interview, and its use of the accused's title. The indictment does not clearly state whether it is the applicant or the media outlet that is alleged to have 'propagandised' or disseminated and how. (It would be highly doubtful on the facts that the background images or descriptions could be deemed to constitute such propaganda in any event.) Likewise it is extremely unclear how simply being interviewed can constitute a plausible basis for the accusation that Dr Fincanci was 'disseminating' propaganda.

One overarching feature of this indictment is that the alleged facts *focus more on the conduct of the media outlet than the individual accused*. The bulk of the conduct alleged relates not to Dr Fincanci's conduct but to the nature and conduct of the media outlet, including vague

[4] Minnesota Protocol Article 27.

references to the network's relationship to the PKK. (It is noted however that it is not made clear whether the outlet is a banned organisation, and in any event this does not constitute the basis of the accused's criminal responsibility as alleged.) The vast majority of the facts and allegations relate to the media outlet having shown images or used language, which are not linked to the individual conduct and intent of the accused. The indictment at times suggests she is culpable for having spoken *to* them, her commentary and status being 'used' *by* them, but there is no apparent basis on which this could constitute the material and mental elements of the crime charged.

The accused's *intent* is also not clearly identified, or substantiated. The indictment appears based on assumptions as to knowledge, at odds with fundamental criminal law principles. It is alleged that her statement regarding chemical weapons and calling for the investigation amounted to an "attempt to legitimise the armed actions of the PKK" (para 9), to "portray[] the Turkish armed forces" in a certain light (para 10) or present the "neutralisation of the members of the terrorist organisation as a guerrilla massacre". To the extent that these enshrine allegations of criminal intent, they are not backed up by evidence. Moreover, as noted above, they address indissociably the behaviour and attitude of a media outlet not of the accused.

Finally, it is noted that there are several places in the indictment where *assumptions of fact* appear in place of supported reasoning. One example is the suggestion that the suspect could see the images and words while giving the interview. While not in my view relevant to her culpability or the inappropriateness of prosecution, as background images of persons killed by chemical weapons or their description as 'guerillas' could not conceivably render her comments criminal, the assertion that it was 'clear' from looking at her on screen that she could see these images is unsupported and factually dubious. In the same vein, criticisms of the accused are advanced in a manner disconnected from the crimes alleged. For example, the assertions that she commented on 'unverified' activities of the Turkish Armed Forces, that she 'used' her title to cast the Turkish state in a negative light and thereby 'legitimise' the PKK are vague, prejudicial and do not reflect the elements of the crimes in Turkish law. This exacerbates the concerns regarding the legitimacy of the indictment process and the independence of the prosecuting authorities (noted under Section 4).

Serious concerns therefore arise as to the compatibility of charging practice in this case and the principles set out in the sections below. There is no clear identification of culpable conduct and intent of the accused that could give rise to a legitimate prosecution in accordance with IHRL and principles of criminal law.

ii) International Standards on Individual Responsibility, Clarity and Specificity

This section sets out basic principles of criminal law which appear to be violated in the present case. Their application to the facts in this indictment are set out in the sections that follow.

Nullum Crimen Sine Lege – clarity of the law, and foreseeability of its application: Non-retroactivity, certainty, precision and foreseeability are prerequisites for any criminal law, consistent with basic 'rule of law' constraints. This is reflected across human rights law,

including the ECHR and ICCPR, in the rule of '*nullum crimen sine lege'*.[5] Article 2 of the Turkish Penal Code likewise states that: *Nobody shall be subject to penalty or security measure for an act which is not clearly prescribed by law as a criminal offence. A penalty or security measure shall not be imposed unless it is prescribed by law.*[6]

This rule requires that laws must be formulated with sufficient clarity and precision to apprise individuals of the requirements of the law.[7] An individual must know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation and legal advice, what acts or omissions will give rise to criminal responsibility,[8] to enable the individual to regulate his or her conduct to the law[9]. Where laws provide for the criminalisation and punishment of conduct that is broadly defined, a rule of law problem may arise, with implications for other important safeguards including the presumption of innocence, rules on burden of proof, and the fairness of the criminal process.

It also follows from the requirements of foreseeability at the heart of the *nullum crimen* rule that the interpretation and application of the law - and the decision to prosecute in the particular case – must be reasonably foreseeable.[10] Concerns regarding the scope of the crime and its unforeseeable application to these facts is addressed below.

Restrictive Interpretation and Application A related basic rule of law principle, reflected in international criminal and human rights law, is that criminal law must be strictly applied and restrictively interpreted.[11] The ECtHR has noted this, adding that criminal law cannot be interpreted by analogy and that any ambiguity should be resolved in favour of the accused. [12] The need for careful review by domestic courts of the scope of crimes and the application of criminal law in concrete cases is essential, as has been made clear by ample jurisprudence and decisions of international courts criticising, for example, unduly broad definitions of terrorism-related offences, including 'propagandising' for terrorism or "indirect incitement", for their lack of clarity and susceptibility to abuse.[13] (See section (ii) below).

Individual responsibility, established through Material and Mental Elements of the Crimes: Considerable lack of clarity emerges from the indictment as to the fundamental question of the nature of the alleged criminal conduct and intent of the accused. Criminal charges and punishment cannot be collective, but must be based on *individual* responsibility. They must be

[5] Art 7 ECHR; Article 15 of the International Covenant on Civil and Political Rights (ICCPR); Ashworth and Zedner, *Preventive Justice* (OUP, 2014), pp. 113-114.
[6] Turkish Criminal Code, Article 2.
[7] *The Sunday Times v. United Kingdom* (No. 1), No. 6538/74, para 49.
[8] *Cantoni v France*, No. 17862/91
[9] Venice Commission, Rule of Law Report 2011.
[10] UNHRC *Garzon v Spain* (2021).
[11] See eg. Article 22 (2) of the Rome Statute of the International Criminal Court

[12] *Sahin Aplay v Turkey*, No. 16538/17, (2018). para. 116. See also e.g. ECHR, *Capeau v Belgium* (Application no. 42914/98), 13 January 2005, para. 25; Jeremy McBride, *Human rights and criminal procedure: The case law of the European Court of Human Rights* (Council of Europe Publishing, 2009), p. 184. www.echr.coe.int/documents/pub_coe_criminal_procedure_2009_eng.pdf
[13] See eg. Duffy and Pitcher,'Indirectly Inciting Terrorism? Crimes of Expression and the Limits of the Law' in Benjamin J Goold and Liora Lazarus, *Security and Human Rights*

justified by and commensurate with culpable *conduct* and criminal *intent* of the individual, which must be made clear.

- ***Conduct - Resulting in Harm or Danger- and remoteness***: It is a basic principle that criminal law cannot punish thoughts, only criminal conduct of the accused.[14] Sharing thoughts or opinions becomes punishable only in exceptional circumstances, where it results in a harm protected in law, or at a minimum a real risk that a crime will be committed as a result, and an intent to commit or contribute to those crimes.[15] Where there is no reasonably proximate link between conduct of the individual and harm caused, or at least risked, as in this case, the charges will be unduly remote.
- ***Criminal Intent***: Intent is the basis for culpability in criminal law. More specifically, where the conduct in question is speech, and alleged to constitute a form of incitement to terrorism, international standards suggest a 'double intent requirement' should be met – the perpetrator intend to engage in the criminal expression and intend that it lead to the commission of one or more criminal terrorist offences. The absence of allegations and evidence regaridng criminal intent in this case is addressed below.

Right to Detailed Notification of Charges*:* Turning to fair trial requirements, among the most basic procedural safeguards in any criminal process within a state governed by rule of law is that an accused must be advised - with sufficient clarity and specificity - of the factual basis of the charges against them. This is reflected in articles 6(3) ECHR and 14(3) ICCPR, both of which make clear that everyone charged with a criminal offence has the '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.[16] The ability to mount a defence and have a fair trial, and respect for presumption of innocence, naturally depend on such notification with clarity and specificity of the charges and their basis. While not all evidence must be available from the outset, provided it is shared sufficiently before trial, international practice reflects that the right to be informed of charges arises from the outset and is essential to safeguard the legitimacy of the decision to bring criminal charges at all.[17]

Article 170/4 of Turkey's Criminal Procedure Code accordingly states that "*the events that comprise the charged crime shall be explained in the indictment in accordance to their relationship to the present evidence."*[18]. Thus, even in order to comply with domestic

[14] The Roman Law principle *cogitationis poenam nemo patitur* translates as "nobody endures punishment for thought". *Justinian's Digest* (48.19.18).

[15] Duffy and Pitcher,'Indirectly Inciting Terrorism? Crimes of Expression and the Limits of the Law' in Benjamin J Goold and Liora Lazarus, *Security and Human Rights*, supra.

[16] Art 6(3) ECHR; article 14(3) ICCPR likewise provides that "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him…"

[17] See eg *Prosecutor v. Kupreskic AJ*, at para. 114: The Appeals Chamber notes that, generally, an indictment, as the primary accusatory instrument, must plead with sufficient detail the essential aspect of the Prosecution case. If it fails to do so, it suffers from a material defect. see generally paras 88-114. https://www.icty.org/x/cases/kupreskic/acjug/en/

[18]https://sherloc.unodc.org/cld/uploads/res/document/tur/2005/turkish_criminal_procedure_code_html/2014_Criminal_Procedure_Code.pdf

legislation, the prosecution must set forth in the indictment specific, clear and foreseeable facts related to the provisions in Article 7 of the Anti-Terror Law. The distinct lack of clarity as to the basis for any alleged responsibility of the accused for the crimes charged represents a fundamental flaw in the indictment in the present case.

iii) The Law and its Application in Turkey: Problems related to the elements of the crime of propaganda under Art. 7(2) of Anti-Terrorism Act (Law no. 3713)

Vagueness and Breadth of the Crimes alleged

The constraints imposed by the principle of *nullum crimen sine lege*, (as well as the 'prescribed by law' test for permissible interference with free expression outlined at Section 2 below), require clarity, precision and foreseeability in the criminal law. So far as the crimes in question are unduly vague and their prosecution and punishment in the present case unforeseeable, they fall foul of legal requirements. As the present case illustrates, uncertainty surrounds the scope and clarity of the crimes themselves - what constitutes 'propaganda', as opposed to the expression of professional opinion on matters of public interest, and what are the material and mental elements of this crime. Several particular concerns with the law are noted below.

Conduct not alleged to have caused harm or created danger; remoteness of connection between the individual and crimes

As noted above, criminal law is generally responsive to harm that has arisen as a result of the culpable conduct of the individual and exceptionally, to dangers or risks of such harm. For crimes of expression to be prosecuted, at a minimum there must be a clear link between the impugned speech and the real and intended risk of harm.[19] Conversely, if there is no reasonable proximity between the person's expression and the claimed harm or risk that has arisen, the link will be too remote to justify individual responsibility, as reflected in for example, even in the broadly framed crime of provocation of terrorism in the CoE Convention, there is an explicit requirement that a statement must "cause a danger that an offence may be committed," and the EU Directive firms it up by specifying that a statement must "*manifestly* cause a danger that a terrorist act will be committed".[20]

The same requirements arise for terrorism-related crimes in domestic law, where the link between the individual prosecuted and harm caused - or at least risked - must be established in reasonable proximity. It is inherent in the individual (as opposed to collective) nature of criminal responsibility and punishment that individuals can only be punished 'for a harm that s/he has done or risked him or herself', rather than for speculative wrongs that may derive from the potential impact of ideas on others,[21] or from risks that may be created by others.

[19] Duffy and Pitcher,'Indirectly Inciting Terrorism? Crimes of Expression and the Limits of the Law' in Benjamin J Goold and Liora Lazarus, *Security and Human Rights* , page 374 - 377

[20] EC, Proposal for a Council Framework Decision amending Framework Decision 2002/475/JHA on combating terrorism, Doc. COM 2007 0650 (6 November 2007), p.450.

[21] Ashworth and Zedner, *Preventive Justice* (OUP, 2014), p. 112.

So far as propagandising for a terrorist organisation as a crime of endangerment (tehlike sucu) criminalises the (ill-defined) act of propaganda irrespective of the materialisation of harm, it may defy the close causal link that is required between the expression and the harm or risk. A key consideration in the assessment of the necessity of restrictions on speech and legitimacy of resort to criminal law set out in relation to ECHR jurisprudence (below) is the actual and real potential danger caused by impugned expression. Indeed the ECHR[22], the Office of the UN Commissioner for Human Rights, the Inter-American Commission on Human Rights and the Special Rapporteur for Freedom of Expression of the OAS have all lent their weight to the international standards indicating that the necessity test requires *"a direct and immediate connection between the speech and the violence to justify restrictions on free speech*[23].

By contrast, Article 7/(2) does not make any reference to the resulting harm, or even real danger that one or more offences may be committed as a result of the impugned statement. Without requiring even "credible danger" or a "reasonable risk of harm", any political statement could easily fall into the prohibited categories of expression under Article 7/(2). This raises multiple concerns, including the remoteness of any plausible connection between defendants such as the one in this case and the ultimate harm, namely acts of terrorism, which puts in jeopardy the principle of individual culpability underpinning criminal law. Notably in this case, the indictment does not indicate the nature of the harm caused or danger resulting from the accused's conduct.

Questions inevitably arise as to what type of deterrence is sought here. Normally, criminal law seeks to deter harmful conduct through the threat or imposition of punishment for harm to protected values, but in the absence of a clear connection with any type of harm, actual or potential, the only reasonable conclusion may be that what the authorities are trying to deter via prosecution is criticism of the state (see Section 4).

Related concerns arise as to the requisite "intent" to cause criminal harm under the law. As noted above, caution is required to ensure that perpetrators are punished commensurate with their criminal intent, which entails both a) intent to make the relevant statement and b) the intent to produce certain consequences. This is reflected for example in the CoE Convention and EU Directive, which refer to "intention" and "the risk of harm." So far as this is not incorporated in the crime of propaganda under Article 7/(2), which appears to require only the deliberate engagement of the perpetrator in the acts of justification, praise or incitement in the statement, the elements of the crime under Article 7/(2) do not appear to meet the basic requirements in respect of individual culpability based on conduct and intent under basic principles of criminal law.

[22] *Çamyar and Berktaş v. Turkey*, No. 41959/02, para.42. ; *Gül and Others v. Turkey*, No. 4870/02, para.42

[23] Joint Press Release of 23 February 2017 on Honduran Penal Code: http://www.oas.org/en/iachr/expression/showarticle.asp?artID=1054&lID=1; See also the Joint Declaration on Freedom of Expression and Countering Violent Extremism adopted by the Rapporteurs on Freedom of Expression in 2016 at http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=19915&LangID=E; Johannesburg Principles on National Security, Freedom of Expression and Access to Information ('Johannesburg Principles'), UN Doc E/CN.4/1996/39.

International Criticism of the interpretation and application of Art. 7/(2) in Turkey

In recent years, there has been extensive criticism of anti-terror laws criminalizing the exercise of freedom of expression and assembly in Turkey, which have been condemned as violations of international human rights standards and the rule of law.[24] In particular at the ECHR, concerns have arisen for years as to the breadth and expansive interpretation of such laws - including the concepts of "aiding an illegal organisation without being a member of it" or "disseminating propaganda of a terrorist organisation" as contravening the principle of the 'foreseeability' and disproportionately interfering with the rights to freedom of expression or assembly.[25] It is noteworthy that the combination of the application of broad terrorism offences in the context of weak evidence, has been highlighted as raising a fundamental problem in relation to the principles of legality and criminal law.[26]

These problems have included specifically in relation to Article 7/(2) of the Anti-Terror Act where for example in *Belge v. Turkey*, the ECtHR found that the offence proscribed by section 7(2) and its interpretation by the domestic court to lack clarity[27]).

As noted above, amendments were specifically introduced to overcome these difficulties, requiring the link to methods of violence. However, the Committee of Ministers has expressed concerns that Article 7(2) as "still too broad and fails to define what the 'limits of reporting' are, and it fails to address the issue of intent".[28] The present case suggests that the amendments are not being adhered to, and certainly not being strictly interpreted in favour of the accused as required by the ECtHR.

In sum, the indictment is problematic for its incompatibility with *nullum crimen sine lege*, as regards both the law and, in particular, its application in this case. The Indictment fails to clearly indicate factual allegations based on the conduct and intent of the individual that fulfil all of the elements of Article 7 of the Anti-Terror Law in a clear and foreseeable manner so as to meet the requirements of IHRL.

Section 2 Freedom of Expression (Criminalising Expression/Art. 10 ECHR)

The indictment makes clear this criminal prosecution is based on statements made by the accused expressing her opinion (in relation to the alleged use of chemical weapons by the state)

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[24] see eg. Venice Commission, Opinion on Articles 216, 299, 301 and 314 of the Penal Code of Turkey, CDL-AD(2016)002, 15 March 2016, para. 106; Concluding observations on the initial report of Turkey adopted by the Committee at its 106th session (15 October - 2 November 2012), para.16; CommDH(2017)5, (note 82) para. 124; Report of the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression on his mission to Turkey, A/HRC/35/22/Add.3, adopted 7 June 2017; Memorandum on Freedom of Expression and Media Freedom in Turkey, by Nils Muižnieks, Council of Europe Commissioner for Human Rights, 15 February 2017; and ECHR case law referred to herein.

[25] Turkish ECHR cases on point include *Yılmaz and Kılıç v. Turkey*, *No.* 68514/01; *Gül and others v. Turkey* (4870/02); *Gülcü v. Turkey; Işıkırık v. Turkey* no. 41226/09, 14.11.2017; *İmret v. Turkey* (No. 2), No. 57316/10,

[26] *Ekin Association v. France*, No. 39288/98, para. 46; *Kızılyaprak v.Turkey,* No. 27528/95 para. 25; *Faruk Temel*, No. 16853/05, para. 61-62; *Öner and Türk v. Turkey*, No. 51962/12, para 24; *Özgür Gündem v. Turkey*, No. 23144/93, para 60.

[27] *Belge v. Turkey*, No. 50171/09, para.29.

[28] The Committee of Ministers, Communication in *Öner and Türk v Turkey*, app. no. 51962/12

in the context of a interview by Haber TV that was broadcast on public television. There is therefore apparently no doubt or dispute that the indictment represents restrictions on freedom of expression under Article 10 ECHR and Article 19 ICCPR.

It can be recalled at the outset that the prevention of terrorism is part of the positive human rights obligations of States to "ensure" respect for rights within their jurisdiction, as the ECtHR recalled in, inter alia, the *Beslan school siege case*.[29] States are not only entitled, but in some circumstances obliged, to take measures to protect security and prevent terrorism, and IHRL reflects the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence (Article 20(2) ICCPR), propagandising for war (Article 20(3) ICCPR), racial hatred (CERD), or hate speech.[30] Preventive measures are required in a range of circumstances, including direct incitement to violent acts of terrorism.

As recognised by the ECHR, free expression is an essential social value for the healthy functioning of democracy,[31] and a prerequisite to guarantee 'the exercise of all human rights', including the right to freedom of thought, conscience and religion[32]. It is recognised as one of the fundamental rights guaranteed under human rights treaties that have been ratified by Turkey and incorporated in domestic law. In the case of a conflict between the provisions of these human rights treaties and the ordinary laws, the former prevails over the latter in accordance with Article 90 of the Constitution.[33]

The right under Article 10 ECHR "include[s] freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers."[34] The ECtHR has reiterated frequently that this right extends not only to those ideas that are considered favourably, but also to those that "offend, shock or disturb the State or any sector of the population."[35] As the ECtHR noted, such are the demands of pluralism, tolerance and broadmindedness without which there is no "democratic society".[36]

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[29] *Tagayeva and Others v Russia;* No. 26562/07. Russia was in violation for its failure to prevent (as well as to adequately respond to) identifiable threats of terrorism. On the debate around the extent and nature of the positive obligations, which may conflict with other rights, see Liora Lazarus, "Positive Obligations and Criminal Justice: Duties to Protect or Coerce?" (OUP, 2012) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2214508

[30] An ECHR Fact sheet on hate speech jurisprudence can be found at https://www.echr.coe.int/Documents/FS_Hate_speech_ENG.pdf. Note that hate speech is, or should be, a narrow category, which can also be subject to abuse. See eg. Nils Muižnieks, Council of Europe Commissioner for Human Rights, "Memorandum on freedom of expression and media freedom in Turkey" Doc CommDH(2017)5 15 February 2017, paras. 119-120, reporting abuse of the hate speech rationale by the Turkish state to justify measures against persons deemed to have insulted the religious views of the majority.

[31] *Handyside v the United Kingdom,* No. 5493/72, para. 49: "Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man."

[32] UNHRC General Comment no. 34 (2011), para. 2; Boyle & Shah in Moeckli, Shah & Sivakumaran (eds), *International Human Rights Law* (2nd edn OUP 2014), p. 217.

[33] Art. 90 of the Constitution: "In the case of a conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail. "

[34] ECHR, art. 10.

[35] *Handyside v. United Kingdom*, No. 5493/72, para 49.

[36] ibid; and ECHR, *Gündüz v Turkey* No. 35071/97, paras. 40 and 51.

As such, while the right to free expression is clearly not absolute, any restrictions must be in accordance with the test governing permissible restrictions enshrined in the treaties themselves.[37] This requires that they be prescribed by clear foreseeable law, pursue a legitimate aim, and be necessary and proportionate to that aim.[38] In assessing the permissibility of restrictions in the present case, it should be recalled that the test is not a broad balancing test, but one where restrictions must be strictly justified.[39]

To determine permissibility the ECtHR will take a holistic "look[s] at the interference in the light of the **case as a whole**, including the **content** of the impugned statements and the **context** in which they were made."[40] ECHR jurisprudence has also set down additional parameters to assess permissible restrictions, including in context of multiple Turkish cases, some of which specifically relate to the interpretation and application of Article 7(2). On the basis set out below, it is my assessment that Dr Fincancı's statements and interview as set out in the indictment do not meet the relevant criteria for permissible restrictions, in particular permissible prosecution, of speech. On the contrary, several aspects of the court's jurisprudence make clear that the current conduct is strictly protected, and falls outside the acceptable parameters of criminal sanction for expressions of opinion under the Convention.

i) Constraining Principles: Freedom of Expression under Human Rights Law

i) Restrictions and criminalisation are not clearly prescribed by law

The "prescribed by law" test ensures that the impugned measure has a legal basis in domestic law and that the law "is formulated with sufficient precision to enable the citizen to regulate his conduct and to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail."[41] The ECtHR reiterates that the quality of law criterion entails that the law should be accessible to the persons concerned and foreseeable as to its effects[42]. In *Imret v Turkey* (no.2) the Court points out that a rule constituting the basis for criminal liability must be formulated with sufficient precision, and afford a measure of protection against arbitrary interference by public authorities and against the extensive application of rights restrictions.[43] In this regard, both the criminal provisions as well as their application have to be clear, precise and foreseeable to protect against arbitrary use of legal discretion.

The Council of Europe Guidelines on protecting freedom of expression and information in times of crisis underscore that "Member States should not use vague terms when imposing restrictions of freedom of expression and information in times of crisis. Incitement to violence

[37] Article 19 of the International Covenant on Civil and Political Rights (ICCPR), Article 19 of the Universal Declaration of Human Right; Article 10 of the ECHR, Article 13 of the IACHR and Article 9 of the ACHPR.
[38] For example, Article 10(2) ECHR makes clear the interference must be '*prescribed by law and … necessary in a democratic society, in the interests [inter alia] of national security, territorial integrity or public safety, for the prevention of disorder or crime, [or] for the protection of health or morals'*.
[39] *Ceylan v. Turkey*, No. 23556/94, para. 32; *Zana v Turkey* No. 69/1996/688/880, para. 51.
[40] *Sürek v. Turkey (no. 1)*, No. 26682/95, para 58; *Özgür Gündem v. Turkey*, No. 23144/93, para 57
[41]Öztürk v. Turkey [GC], No. 22479/93, para. 54..
[42] *Imret v Turkey* (no.2), No. 57316/10), para.42.
[43] Ibid, para.53; *Malone v. the United Kingdom*, No. 8691/79, para. 67.

and public disorder should be adequately and clearly defined".[44] Similarly, the Human Rights Committee emphasises that offences of "praising", "glorifying", or "justifying" terrorism, should be clearly defined to ensure that they do not lead to unnecessary or disproportionate interference with freedom of expression.[45]

The prescribed by law test, and particular stringent approach required in relation to the criminal law, reflects the fundamental principle of *nullum crimen sine lege* (above). Ongoing concerns regarding the scope and clarity of Turkish law on 'propagandising', and in particular the lack of foreseeability of the prosecution of this set of opinions under that particular charged, have been noted above.

b) Prosecution does not appear to pursue a Legitimate Aim

Prevention of crime and the protection of national security or public order may constitute legitimate aims, capable of justifying restrictions on free expression in certain circumstances. While these categories are broad, they are not open-ended or indeterminate. Although the legitimate aim criterion is not often the focus of attention by the ECtHR in reaching decisions, it is an important test[46] that should be considered carefully by Turkish courts to protect against overreach and misuse of terrorism and incitement laws for ulterior purposes (also reflected in article 18 below).

It is doubtful from the face of the indictment that this restriction corresponds to the aims of national security or public order set out in the conventions. The speech called for an investigation into allegations against the state, which cannot in themselves give rise to a national security or public order danger, and as noted above no such danger or risk is alleged or supported. Given the emphasis placed on the role the interview may have played in bringing the Turkish state into disrepute, it should be recalled that the protection of the interests of "the state" as such, still less protecting it from criticism, is not itself a legitimate aim recognized in human rights treaties.[47]

There would not appear to be a legitimate aim at issue in the present case. However, even if there were such an aim, the key question – as reflected in ample ECHR jurisprudence – is often the next criteria namely the necessity and proportionality of criminal prosecution.

c) Restrictions – in particular criminal prosecution – are not necessary and proportionate in all the circumstances

Any limitation on freedom of expression must, on all the facts, be "necessary" – pursuant to a "pressing social need" – and proportionate to the specified legitimate aims.[48] The necessity test must not be misunderstood as a simple "balancing" test as "the choice is not between two conflicting principles but with a principle of freedom of expression that is subject to a number

[44] Venice Commission, Report on Counter-Terrorism and Human Rights, Study no. 500/2008, CDLAD(2010)022, 05 July 2010.
[45] Human Rights Committee, CCPR/C/GC/34, General Comment 34, adopted 12 September 2011, para. 46.
[46] *Perincek v. Switzerland*, No. 27510/08, para.145*; Izmir Savas Karsitlari Dernegi v. Turkey*, No. 46257/99, para.35.
[47] Council of Europe Commissioner for Human Rights, Memorandum on Freedom of Expression and Media Freedom in Turkey, CommDH(2017)5, 15 February 2017.
[48] *Handyside v United Kingdom*, No. 5493/72, para. 49.

of exceptions which must be narrowly interpreted".[49] Accordingly, where a dispute arises, the burden of proving that any constraint on expression was permissible falls to the State.[50]

If expression is to be restricted on the ground that it poses a threat to national security, the danger posed must not be abstract or hypothetical. In this case however, there is no such harm or danger indicated in the indictment (or perhaps required on the face of the law as noted above). However jurisprudence of the Inter-American and European human rights courts have made clear, it must for example involve at least "a reasonable risk of serious disturbance"[51] to the public order in a democratic society, rendering a restriction on freedom of expression justifiable[52]. The case-law of the EctHR often questions the "impact on national security or public order," potential impact or "clear and imminent danger"[53] in the assessment of whether there was a 'pressing social need' justifying the limitation of freedom of expression.'

When deciding whether the restriction on freedom of expression is necessary, human rights courts and bodies assess the situation on a case by case basis, in light of each case's particular facts and context.[54] 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'.*[55]

Criminal prosecution has often been described as an exceptional measure of ultimo ratio (last resort), which requires weightier considerations to justify its use as necessary and proportionate to speech. The ECtHR has noted in several cases concerning Article 10 that a criminal conviction is a serious sanction that must be strictly justified.[56] In this respect, the European Court has noted that *"the dominant position which the government occupies makes it necessary for it to display restraint in resorting to criminal proceedings"* in response to criticism.[57]

A review of case-law reveals the following factors and principles that have been relevant to the ECtHR's assessment of whether restrictions, including prosecution, has been justified by the necessity and proportionality test based on the content of the speech in the particular context .

The Content and Context – incitement to violence or hatred?

The ECHR's assessment of the necessity of interference typically revolves around whether the content of the speech, in the particular context, incites or "call[s] for violence" or constitutes

[49] *Sunday Times* v *United Kingdom (no. 1),* No. 6538/74, para. 65.
[50] UNGA, Promotion and protection of the right to freedom of opinion and expression, 6 September 2016, UN Doc. A/71/373, para. 9 – quoting UN HRC General Comment No 34. (2011), paras. 27 and 21.
[51] Inter-Am. C.H.R., *Francisco Uson Ramirez v Venezuela*, judgment of 20 November 2009. Case 577-05, Report No. 36/06, Inter-Am. C.H.R., OEA/Ser.L/V/II.127 Doc. 4 rev. 1 (2007), para 89.
[52] e.g. *Zana v. Turkey*, No. 18954/91; *Surek v. Turkey* (No.1), No. 26682/95; *Surek v. Turkey* (No.3) No. 24735/94,; *Medya FMŞener v. Turk Reha Radyo ve Iletisim A.S v. Turkey*
[53] *Gül and Others v. Turkey*, No. 4870/02, para.42.
[54] legal standards inevitably become somewhat intertwined with particular facts. For an example see Leroy v. France, No. 36109/03, paras. 3-8.
[55] *Ceylan v Turkey*, No. 23556/94, para. 32.
[56] *Lehideux and Isorni v. France* , No. 24662/94
[57] Ibid.

"incitement to hatred" violence or amounts to hate speech.[58] The red line over which protected speech cannot pass therefore is when the statement constitutes a call for violence, armed insurrection or uprising, or infuses hatred likely to increase violence or jeopardise physical integrity[59].

A large body of jurisprudence of human rights courts, including a significant number of Turkish cases before the EctHR,[60] and broader international practice including the Security Council (SC) Resolution 1624,[61] regional standard-setting such as the Council of Europe Convention on the Prevention of Terrorism[62] ('the CoE Convention') and the EU Directive on Combatting Terrorism[63] ('the EU Directive') reflect that in exceptional circumstances incitement or provocation of terrorism can be criminalised. However, these standards also make clear that the lawfulness of prosecuting speech depends on certain strict constraints. As noted above in relation to individual responsibility as a fundamental criminal law principle, there should however be a close relationship between the speech and the harm, or at a minimum danger or risk created by the speech in question. As such, the UN Secretary General has emphasised how the crime of incitement reflected in SC Resolution 1624 should be interpreted and limited: *[L]aws should only allow for the criminal prosecution of direct incitement to terrorism, that is, speech that directly encourages the commission of a crime, is intended to result in criminal action and is likely to result in criminal action (emphasis added)*[64]

IHRL suggests that a key consideration is again the proximate relationship between the speech and incitement to violence, which must be distinguished from for example speech which is deemed supportive of groups or causes. The case-law of the ECtHR supports a strict approach to what constitutes incitement to violence and provides guidance on what type of expressions do *not* amount to such incitement, of relevance to this case.

In this regard, the Court has noted that 'a message of intransigence as to the objectives of a proscribed organisation cannot be confused with incitement to violence or hatred'.[65] Restrictions require more than the use of words such as 'resistance', 'struggle' or 'liberation',

[58] e.g. *Halis Doğan* v *Turkey (no. 2)*, No. 71984/01 ;*Fatullayev v Azerbaijan*, No. 40984/07); *Sener v Turkey*, No. 26680/95; *Ozgur Gundem* v *Turkey*, No. 23144/93; *Surek v Turkey (no. 2)*, No.24122/94; *Müdür Duman v. Turkey*, No 15450/03; *Gözel and Özer v.Turkey*, No. 43453/04, para 56, 60.
[59] *Surek v. Turkey* (No.1), No. 26682/95, 8 July 1999.
[60] e.g. ECHR, *Halis Doğan v Turkey* (no. 2), No. 71984/01; *Ozgur Gundem v Turkey* No. 23144/93; and *Surek v Turkey* (no. 2), No.24122/94; *Müdür Duman v Turkey*, No 15450/03
[61] UN Security Council Resolution 1624 (2005), UN Doc. S/43S/1624 (2005), paras. 1 and 3.
[62] Adopted on 16 May 2005. See: https://rm.coe.int/168008371c
[63] Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA. See: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32017L0541&from=EN
[64] UN General Assembly, "The protection of human rights and fundamental freedoms while countering terrorism: Report of the Secretary General" (28 August 2008), UN Doc. A/63 Office of the United Nations High Commissioner for Human Rights, Factsheet on Human Rights, Terrorism and Counter-Terrorism (no. 32)
[65] *Surek and Ozdemir v. Turkey*, Nos. 23927/94 and 24277/94), para. 61.; *Erdogdu v. Turkey*, No. 25723/94 and *Ceylan v. Turkey*, No. 23556/94

or 'accusations of "state terrorism" or "genocide"'.[66] Similarly, expressing support for a leader of a 'terrorist organisation' without further incitement to violence does not suffice.[67]

The ECtHR has also stated that neither publication of a statement by a person who is a member of an illegal organisation[68] nor a harsh public criticism of government policies[69] would itself justify the restriction of freedom of expression.

Greater latitude is given to states in certain contexts none of which are relevant to the impugned speech in this case.[70] The Court has shown more deference to restrictions made on speech that related to attacks by terrorist organisations in the immediate aftermath, [71] or to armed violence by such groups in areas where there is an intense history of violence.[72]

The key question has remained whether the statements, fairly construed and seen in their immediate or wider context, could be seen as a direct or indirect call for violence, hatred or intolerance[73]*).* In the absence of a call for violence or hatred, expressions which discuss causes or sources of terrorism or unrest, or indeed support unorthodox or anti-democratic ideas, for example defending sharia, without calling for violence to establish it,[74] enjoy protection under Article 10.

In this case, Dr. Fincancı did not in any capacity make any statements calling for the incitement of violence, nor could the statements in the indictment be construed in this manner as they did not relate to or support, still less call for, violence by the PKK or other group. It follows with greater force, that speech that may be deemed to criticise the authorities' conduct, without incitement to violence in response, cannot be subject to restrictions or prosecutions as the Court has consistently made clear. [75]

- *The Content <u>not the Source</u> of the Information as key, and support for groups (in fact or perceived) is insufficient*

The ECHR has distinguished the content of speech from its source, such that restrictions on publication of statements (which did not advocate violence) could not be justified on the basis that they were made by or through a banned organisation.[76] Thus even if the media outlet had

[66] *Ceylan v Turkey*, para 34
[67] ECHR, *Yalçinkaya and others v Turkey*, No. 15669/20, (French) para 34; the criminal prosecution for expressing a 'mark of respect' for a leader of a deemed terrorist organisation – in the absence of inciting violence or endorsing violent activities – constituted an unjustifiable limit on free expression.
[68] Gözel ve Özer – Türkiye, 6 Temmuz 2010
[69] Belek- Türkiye, 20 Kasım 2012; Demirel ve Ateş – Türkiye, 12 Nisan 2007.
[70] *Sürek and Özdemir v. Turkey* , Nos. 23927/94 and 24277/94
[71] For example, in *Lehideux and Isorni v. France*, the ECHR ruled, referring to remarks made in a eulogy about a French Nazi collaborator, that 'it [is] inappropriate to deal with such remarks, forty years on, with the same severity as ten or twenty years previously.' *Lehideux and Isorni v. France*, No. 55/1997/839/1045, para 55.
[72] In *Leroy v France*, the fact that the cartoon was featured in a publication in the Basque region, an area particularly sensitive to national security threats, was a factor in holding it to be a threat to national security. Zana v Turkey REF. Similarly, Purcell and Others v Ireland, Decision on Admissibility, (Application No 15404/89) 16 April 1991
[73] *Incal V Turkey*, No.22678/93.
[74] *Gündüz v. Turkey*, No. 35071/97, 4 December 2003.
[75] *Gerger v. Turkey* [GC], No. 24919/94, para.50 ; *Şener v. Turkey*, No. 26680/95
[76] *Belek and Velioglu v Turkey*, No. 44227/04 ; *Gözel and Özer v. Turkey*, Nos 43453/04 and 31098/05

been a banned organisation (which is not the allegation in the indictment), the key question would remain the nature of the speech in question and whether it advocated violence or hatred in the particular context.

Also of potential relevance to the present case is the Court's finding that it is insufficient that the opinion expressed by individuals is *supported* or *shared by an illegal organisation*. As stated by former European Commissioners for Human Rights Hammarberg and Muižnieks, whether expressions of opinion may have coincided with the aims or instructions of an illegal organisation cannot be the guiding criteria.[77] Likewise in *Erkizia Almandoz v. Spain*, the ECtHR found a violation of Article 10 where someone was convicted for giving a speech at a rally to honour a deceased member of ETA as the matter discussed was one of general public debate (an area which the court states there is little margin for restriction as noted below) and that the penalty imposed was excessive given the circumstances.[78]

- *Importance of Protection of Speech in the public interest and on issues of public debate*

Particular protection is due to political speech or speech related to issues of public interest. In this case, the indictment can be seen as infringing on Dr Fincancı's right to freely speak about an issue of public interest, namely the possible use of chemical weapons violations by State agents and the investigation thereof. This concern, and indeed the lawfulness of their use, does not depend on the nature of victims and whether they were or were not members of the PKK as is alleged. The issue remains of public concern, affording less room to limit free speech.

The fact that several others – including international actors and media[79] - have also raised the same concerns and called for investigation, underscores the legitimacy of the request for an investigation and the lack of reasonable basis for criminalisation of that expression in this case.

The ECHR has made clear that political expression, including on an issue of human rights protection, as in this case, deserves a very high level of protection.[80] One relevant case in this respect is *Güçlü v. Turkey*, where the applicant, a lawyer and politician, stated during a press conference that Turkey's actions in 1915 amounted to genocide and that Turkey needed to come to terms with this and engage in open debate on this issue. The Court found that Mr Gulcu's statement clearly concerned a debate on a question of public interest and that expression of such opinions, even if they did not match those of the public authorities and could offend or shock some, were protected; debate by definition consisted in the expression of divergent points of view, which had to be protected under Article 10.[81] Therefore, even if the

[77]Report by Thomas Hammarberg, CommDH(2012)2, para.70; Memorandum by Nils Muižnieks (no.55)
[78] *Erkizia Almandoz v. Spain*, No. 5869/17, paras.44-50.
[79] See for example International Physicians for the Prevention of Nuclear War (IPPNW) Report at https://www.ippnw.de/commonFiles/bilder/Frieden/2022_IPPNW_Report_on_possible_Turkish_CWC_violations_in_Northern_Iraq.pdf ; Airwars at https://airwars.org/civilian-casualties/ti070-september-4-2021/ ; Christian Peacemaker Teams; University of Munich's Institute of Forensic Medicine analysis of 1999 attack (original analysis unavailable but corroborated by page 5 of IPPNW Report)
[80] UNHRC General Comment 34; *Wille v. Liechtenstein*, App. No. 28396/95, para. 61; *Kula v. Turkey*, App. No. 20233/06, para. 47.
[81] *Güçlü v. Turkey* No. 27690/03), paras 33-42.

Turkish authorities disagree with the statements made by Dr Fincancı, they must be afforded a high level of protection and cannot be criminalised in line with Article 10 ECHR.

Likewise the ECtHR has emphasised the importance of *media freedom* in a democratic society, accepting that even groups that support extremist ideas should be able to find ways to express themselves peacefully and for the public to be informed of them.[82] The Court has also paid close attention to the immediate *context* and *manner* in which the statements were made and the implications for the impact of the statements. In *Gündüz v. Turkey*,[83] where statements had been made in the course of a pluralistic televised debate, any negative effect was lessened. This can be contrasted to *Féret*, where anti-immigrant statements were made on electoral leaflets and the Court noted that 'political speech that stirred hatred based on religious, ethnic or cultural prejudices was a threat to social peace and political stability in democratic States.'[84] The former is directly relevant to the indictment of Dr Fincancı where the statement regarding the use of chemical weapons and the need for an independent investigation were not only matters of public concern, but were made in a reserved, academic and expert manner, on a public television channel.

Dr Fincancı's statements cannot be seen as a call for hatred, violence or intolerance. They stand in sharp contrast to those cases where the court has found restrictions permissible – such as in *Taşdemir v Turkey*, where the applicant stated, ""Biji Serok Apo, HPG cepheye misillemeye" (Long live Apo! HPG [the armed wing of the PKK] to the front line in retaliation!) for example. The ECtHR viewed the content and the context of slogans, and whether they are linked with engagement in violence, in contrast to the present case. The content and context of the present indictment cannot plausibly justify restrictions in light of the ECHR's jurisprudence to date.[85]

- *Statements regarding information in the public domain*

It is also noted that the indictment does not allege that information was placed in the public domain by the accused, but rather she commented on pre-existing reports. In *Handyside*, where part of the Court's conclusion that there had been a violation of Article 10 was in part as the stories were already in the public domain. Likewise, Dr Fincancı's statements regarding Turkey's suspected use of chemical weapons in violation of the Chemical Weapons Convention had been documented by other independent reports and mainstream media outlets.[86] The statement of opinion in her case therefore related to information that was both already in the public domain and which concerned a matter of the public interest.

When the ECtHR factors are considered as a whole, it is evident that the Turkish authorities have insufficiently demonstrated why Dr Fincancı's statements amount to the dissemination of propaganda as defined in clear accessible law, and why the serious interference through criminal law is strictly necessary and proportionate in a democratic society.

[82] *Sener v. Turkey*, para.41; *Jersild v. Denmark*, No. 15890/89, para. 31.
[83] *Gündüz v. Turkey*, No. 35071/97, paras. 43-44.
[84] *Féret V Belgium*, No. 15615/07
[85] *Taşdemir v Turkey*, No. 38841/07),
[86] IPPNW, "Is Turkey violating the Chemical Weapons Convention?" 2022.

Section 3: Other International Standards Relevant to the Lawfulness of Criminal Charges in the Fincanci Case

This section draws attention, more briefly, to additional violations that may arise were a prosecution to proceed on the basis set out in the Reviewed Indictment.

Prosecution for Ulterior Purpose in violation of Article 18?

Article 18 has recently been invoked by the ECtHR in several Turkish cases involving misuse of state power through repressing dissent or excessive criminalisation; both of these issues deserve consideration in the present case. The ECHR has held that Article 18 is violated when "the restriction of [an] applicant's right or freedom was applied for an ulterior purpose" as assessed "from the combination of the relevant case-specific facts"[87]. Where "there was a plurality of purposes," the Court would base its determination on the dominant purpose.[88]

In *Rasul Jafarov v Azerbaijan and Aliyev v Azerbaijan*, the totality of circumstances led the Court to conclude that in both cases "*the actual purpose of the impugned measures was to silence and punish the applicant for his activities in the area of human rights*."[89] In these cases, and the recent case of *Selahattin Demirtaş v. Turkey (*No 2), the Court has pointed to several indicators or factors that may, in all the circumstances, point to such an ulterior purpose. These have included, evidence showing a "larger campaign to crack down on human rights defender," a "general context of the increasingly harsh and restrictive legislative regulation of NGO activity and funding," and a practice of stifling dissent by using criminal law measures in particular and a lack of judicial independence.[90] Recently, in *Kavala v Turkey*, the Grand Chamber stated that, it was established "beyond reasonable doubt" that measures were instituted against him, contrary to Article 18, to "reduce him to silence" and to have a "dissuasive effect on the work of human rights defenders".[91]

Where the state is using incitement and provocation of terrorism to repress dissent, to silence human rights defenders directly or through the chilling effect, this will fall foul of Article 18.[92]

Violations of the Right to Private Life (Art. 8 ECHR)

The indictment could be seen as a disproportionate interference with Dr. Fincancı's right to private and professional life protected under Article 8 ECHR. The ECtHR has held that the protection of private life extends to the development and exercise of one's professional life, including through expert opinions on issues related to professional experience.[93] The Court recognises this includes relationships "of a professional or business nature",[94] and the interplay

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[87] *Ilgar Mammadov v Azerbaijan*, No. 15172/13, para. 142.
[88] *Merabishvili v. Georgia [GC],* No. 72508/13, para. 291 and 309.
[89] Ibid para. 162.
[90] *Selahattin Demirtaş v. Turkey* (No. 2), No.14305/17; *Rasul Jafarov v Azerbaijan*, No. 69981/14, paras. 159-162; *Aliyev v Azerbaijan*, No. 68762/14 and 71200/14, para. 206
[91] *Kavala v Turkey*, No. 28749/18, para.232
[92] Article 18 of the ECHR provides "Limitation on use of restrictions on rights "The restrictions permitted under [the] Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed."
[93] See e.g. *Antovic and Mirkovic v. Montenegro*, No. 70838/13, para 42; *C. v. Belgium*, No. 21794/93, para 25.
[94] *C. v. Belgium*, No. 21794/93, para 25. See also *Niemietz v. Germany*, No 13710/88 para. 29. The Court also recognized the right to a "private social life" in *FNASS and Others v. France*, Nos. 48151/11 and 77769/13, para.

between professional life and other fundamental aspects of Article 8, namely personal, social and intellectual autonomy, identity and self-development.[95] Likewise, the Court has held that "it is not always possible to distinguish clearly which of an individual's activities form part of his professional or business life and which do not. Thus, especially in the case of a person exercising a liberal profession, his work in that context may form part and parcel of his life to such a degree that it becomes impossible to know in what capacity he is acting at a given moment of time".[96]

The indictment infringes upon this right as the government seeks to penalize Dr. Fincancı for exercising her profession as a medical professional, a professor, and as a human rights advocate. Reliance on the use of her title during the interview is relied upon as a putative basis for finding her culpable raises further serious doubts in this respect. As noted under article 10, there is insufficient justification for the restrictions in this case as proscribed by law, pursuant to a legitimate aim, necessary or proportionate.

Protection of Academic Freedom

Dr Fincancı should be able to freely exercise her academic freedom as a researcher and academic. The importance of academic freedom is recognised in a growing body of regional and global law and practice. International treaties,[97] jurisprudence of this Court[98] and others,[99]and soft law instruments (including of the CoE),[100] embrace academic freedom and the fundamental principles that underpin it. The EU Charter on Fundamental Rights clearly states that "academic freedom shall be respected".[101] The Turkish Constitution refers to the freedom to "study and teach, express, and disseminate science and the arts, and to carry out research in

153. "it is in the course of their working lives that the majority of people have a significant, if not the greatest, opportunity to develop relationships with the outside world."; *Bărbulescu v. Romania*, No. 61496/08, para. 71; *Niemietz v. Germany*, No. 13710/88, para. 29.

[95] See eg, *Fernández Martínez v. Spain*, App No. 56030/07, para. 126; *A.-M.V. v. Finland*, No. 53251/13, para. 76; *Brüggemann and Scheuten v. Germany*, No. 6959/75, para. 55.

[96] *Niemietz v. Germany*, No. 13710/88, para. 29.

[97] Art. 15(3) International Covenant on Economic Social and Cultural Rights (ICESCR) and Article 13(2) Charter of Fundamental Rights of the European Union (EU Charter).

[98] On academic expression under Article 10 see: *Sorguc v Turkey*, No. 17089/03; *Mustafa Erdoğan v. Turkey,* No. 346/04 and 39779/04; *Hasan Yazıcı v. Turkey*, No. 40877/07; on denying entry to academics *Cox v. Turkey*, No. 2933/03,

[99] IACHR, *Ricardo Israel Zipper v Chile* (2009), http://cidh.oas.org/annualrep/2009sp/Chile12470.sp.htm. See also AfCHPR, *Good v. Republic of Botswana*, Comm. No. 313/05,. 196–200.

[100] E.g. Rec- CM/Rec(2012)7 of the Council of Europe (CoE) Committee of Ministers (COM) on the responsibility of public authorities for academic freedom and institutional autonomy, 20 June 2012; PACE Rec. 1762 (2006) on Academic freedom and university autonomy, 26 September 2007; Magna Charta Universitatum, 18 September 1988; Declaration on Academic Freedom and Autonomy of Institutions of Higher Education ("Lima Declaration"), 10 September 1988; UNESCO Rec. concerning the Status of Higher-Education Teaching Personnel, 11 November 1997; European Parliament Rec. on Defence of Academic Freedom in the European Union's (EU) external action (2018/2117(INI)), 29 November 2018; UNESCO World Declaration on Higher Education for the 21st Century: Vision and Action, 9 October 1998; UNESCO Rec. on Science and Scientific Researchers 2017; IACHR, InterAmerican Principles on Academic Freedom and University Autonomy ("Inter-American Principles").

[101] Art. 13 (2) of the Charter of Fundamental Rights of the European Union, 26 October 2012; CJEU, C-66/18, Commission v Hungary, Judgment of 6 October 2020, at para. 225: "that freedom is not restricted to academic or scientific research, but that it also extends to academics' freedom to express freely their views and opinions".

these fields freely".[102] The Court has noted the need for "careful scrutiny [of] any restrictions on the freedom of academics to carry out research and to publish their findings".[103]

Ensuring an 'enabling environment' for Human Rights Defenders

The nature of the speech in question, and the role of the accused, also raise questions as to compatibility of the prosecution with the responsibility of the state to create an 'enabling environment' for human rights defenders (HRDs). International and regional human rights bodies[104] have expressed concern,[105] including in relation to unwarranted pre-trial detention and prosecutions of HRDs, in a manner described as "judicial harassment."[106] The UN Special Rapporteur on freedom of expression is among those to have expressed concern about the impact of criminal law on free expression, "squeezing of civil society space" and "radical backsliding of Turkey's democratic path".[107]

The ECtHR has emphasized repeatedly the "public watchdog" role of HRDs and called for the strictest scrutiny of measures against them[108] which may have a chilling effect on civil society "who, for fear of prosecution, may be discouraged from continuing their work of promoting and defending human rights."[109] It has noted "states must focus on the protection of critics of the government, civil society activists and human rights defenders against arbitrary arrest and detention," taking measures to "ensure the eradication of retaliatory prosecutions and misuse of criminal law" against these vulnerable groups.[110]

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[102] Article 27 of the Turkish Constitution. On non-application, concerns see e.g. Scholars at Risk's Submission to the Third Cycle of Universal Periodic Review of Turkey 35th Session of the United Nations Human Rights Council to be held in January 2020; Ayse Çaglar, 'Blow by Blow: The Assault on Academic Freedom

[103] *Aksu v. Turkey*¸ Nos. 4149/04 and 41029/04, para 71; see also *Mustafa Erdoğan v. Turkey*, No. 346/04 and 39779/04, para. 40; Inter-American Principles, Preamble; UN Special Rapporteur on Freedom of Expression, 2020, paras. 16 and 24.

[104] European Parliament Committee on Foreign Affairs, Report on the 2018 Commission Report on Turkey, 26 Feb. 2019, p. 8. para. 9, http://www.europarl.europa.eu/doceo/document/A-8-2019-0091_EN.pdf; the Commissioner for Human Rights of the Council of Europe, Third Party Intervention in *Kavala v. Turkey*, No. No. 28749/18, paras. 5-17, https://rm.coe.int/third-party-intervention-before-the-european-court-of-human-rights-cas/1680906e27

[105] European Union Agency for Fundamental Rights, Challenges facing civil society organisations working on human rights in the EU, January 2018, p. 8 and 49.

[106] The Commissioner for Human Rights of the Council of Europe, Thomas Hammarberg, Report on administration of justice in Turkey, CommDH(2012)2 p.9; and 5 years later: Nils Muižnieks, the Commissioner for Human Rights of the Council of Europe, Memorandum on freedom of expression and media freedom in Turkey, CommDH(2017)5, para.46; see also UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (UN Special Rapporteur on terrorism), E/CN.4/2006/98, para. 14; CoE European Commission for Democracy Through Law (Venice Commission), Opinion on Articles 216, 299, 301 and 314 of the Penal Code of Turkey, CDL-AD(2016)002, 11-12 Mar. 2016.The Commissioner for Human Rights of the Council of Europe, CommDH(2017)5, Section II.

[107] United Nations General Assembly, Report of the Special Rapporteur on the Promotion and Protection of the right to freedom of opinion and expression on his mission to Turkey, A/HRC/35/22/Add.3 2017, para 7.

[108] *Sdruženi Jihočeské Matky v. Czech Republic*, No. 19101/03 *; Társaság a Szabadságjogokért v. Hungary*, No. 37374/05 ; *Magyar Helsinki Bizottság v. Hungary [GC*], No. 18030/11

[109] *Aliyev v Azerbaijan*, No. 68762/14 and 71200/14, paras. 213, 223.

[110] Ibid., paras. 226.

The UN Declaration on Human Rights Defenders (Declaration)[111] the Committee of Ministers' (CoM) Declaration on CoE Action to Improve the Protection of Human Rights Defenders and Promote their Activities (CoE Declaration) and subsequent Parliamentary Assembly resolutions[112] all similarly call on states to ensure an 'environment conducive' or 'enabling enivronment' for the work of HRDs.[113] Resort to criminal investigation and prosecution, and detention of HRDs, as a particularly coercive and problematic form of interference is reflected in the Declaration and other standards, such as the OSCE Guidelines which provide that HRDs *"must not be subjected to judicial harassment by unwarranted legal and administrative proceedings or any other forms of misuse of administrative and judicial authority, or to criminalization, arbitrary arrest and detention."*[114]

The UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms,[115] also enshrines the right to promote and seek protection of human rights.[116] In Article 8 it specifically provides that individuals shall have the right to *criticise* government and draw attention to conduct that hinders or impedes human rights[117] (which is reflected in art 7(2) of the Turkish law amendment allowing expression for the purpose of criticizing too). Article 9(3) protects the rights of individuals to complain to the government[118] while Article 12 requires protection under national law of those reacting against or opposing, in a peaceful manner, governmental actions that allegedly violate human rights.[119]

Turkey's prosecution of Şebnem Korur Fincancı, far from creating an enabling environment for defence of human rights and protecting criticism of possible human rights violations, explicitly condemns her for implicitly criticising the state and making proposals in respect of human rights protection. The right to call on the government to investigate an alleged violation of human rights is, as noted below, an essential dimension of the protection of human rights of others.

Consistency of Comments with the Duty to Investigate under the ECHR

It is antithetical to the ECHR to prosecute someone for calling on the state to take measures it is required to take under the Convention. These include the duty to investigate serious violations of the right to life, including through the use of chemical weapons.

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[111] United Nations General Assembly [on the report of the Third Committee (A/53/625/Add.2)] 53/144, Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms

[112] PACE Resolution, Resolution 2225 (n24)(2018).

[113] CoE Committee of Ministers, Declaration of the Committee of Ministers on CoE action to improve the protection of human rights defenders and promote their activities, 6 February 2008, Article 2

[114] OSCE Guidelines , (n33), para. 23.

[115] Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, UN Doc. A/RES/53/144 (8 March 1999).

[116] Ibid. art. 1.

[117] Ibid. art. 8.

[118] Ibid. art. 9(3)(a).

[119] Ibid. art. 12(3).

Under the ECHR, States are obliged to conduct an investigation into allegedly unlawful deaths which occurs as the result of the use of force by State officials.[120] This obligation is triggered whenever the matter comes to the attention of State officials and they must conduct the investigation of their own volition, without the need for a formal request to be lodged by the next of kin or other civil society actors.[121] Dr Fincanci was therefore invoking the state's responsibility to conduct an independent investigation. The ECHR provisions set out above, requiring restraint in criminal law, and strict necessity and proportionality of restrictions through criminal law of free expression must be interpreted in light of these obligations under the same Convention.

Section 4: Other Prosecutorial Issues

A final set of concerns relate to prosecutorial independence. The principle that investigations and prosecutions must be conducted independently and impartially is a key rule of law requirement. This indictment, issued by the Chief Prosecutor in the Terrorism Crimes Investigation Office, refers to the fact that the investigation was launched by the General Directorate of Legal Services of the Ministry of National Defence (Indictment p.1), at least raising questions as to the independence of the investigatory and prosecutorial decisions. The accused is being prosecuted at the behest of Ministry of Defence for her criticism of the actions of the Ministry of Defence.

The tone and content of the Indictment, referred to throughout this review, exacerbate those doubts. The allegation that criminal behaviour arose from calling for an investigation, and thereby portraying the 'armed forces responsible for defence and protection of the indivisible integrity as having been engaged in an illegal act' is one example. The statement that the activities of the armed forces were 'legal activities of the Turkish armed forces under the scope of legitimate self defence…' is another. By contrast, references to 'neutralised terrorists' and objecting to the use of the term 'massacres,' engage value-laden and politicised commentary that may be considered inappropriate for a criminal indictment.

Similar concerns arise from the inclusion of prejudicial evidence of doubtful relevance to the charges. The indictment refers to the accused's "prior social media posts" in apparent support of the charges; yet there is no information in the indictment pertaining to what these social media posts say, their relevance or what weight they were given in the decision to indict Dr. Fincancı. The implication that her prior statements or conduct are consistent with her prosecution, without clarifying their relevance, is prejudicial. Criticism for commenting on a video without having been 'on-site,' and refuting her expertise, are of dubious relevance.

The reference to the prosecutor seizing Dr. Fincancı's digital materials and that the outcome of the examination can be 'added to the file at the stage of prosecution' raises doubts as to a possible 'fishing expedition' by the prosecution. If the allegations in the indictment relate to Dr. Fincancı's statement, and use of her title with the Turkish medical association in the video interview, it is not clear how her social media posts, or the digital materials that were seized, are relevant to the prosecution's case. Fair trial concerns may arise if the preparation of an

[120] *E.g., Hugh Jordan v. United Kingdom*, No. 24746/94105.
[121] Ibid.

adequate defence is impeded, particularly if additional charges not in the original indictment are added at a later stage.[122]

The Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors adopted by the International Association of Prosecutors in 1999 state that prosecutors must proceed with a criminal case only when it is well-founded on evidence that is reasonably believed to be both reliable and admissible at trial.[123] The prosecution in this case does not appear to be in compliance with this standard.

The crimes alleged, the factual basis set out in the indictment and the evidence referred to are manifestly insufficient to constitute reasonable suspicion of criminal activity. The indictment is, on its face, flagrantly incompatible with Turkish obligations under IHRL detailed in this Indictment Review.

[122] See *Öcalan v. Turkey*, No. 46221/99, para 140.

[123] International Association of Prosecutors, Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors (1999) § 4.1(d), available at: https://www.icj.org/wp-content/uploads/2014/03/IAP-Standards-of-professional-responsibility-duties-rights-prosecutors-instruments-1999-eng.pdf