BAR HUMAN RIGHTS COMMITTEE OF ENGLAND & WALES

TRIAL OBSERVATION REPORT

Osman Kavala & others v Turkey

Gezi Park, civil society and rights activists on trial

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ARTICLE 19

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About the Bar Human Rights Committee

The Bar Human Rights Committee ("BHRC") is the international human rights arm of the Bar of England and Wales. It is an independent body, distinct from the Bar Council of England and Wales, dedicated to promoting principles of justice and respect for fundamental human rights through the rule of law. It has a membership of nearly five hundred lawyers, comprised of barristers practicing at the Bar of England and Wales, legal academics and law students. BHRC's fifteen Executive Committee members and general members offer their services *pro bono,* alongside their independent legal practices, teaching commitments and/or legal studies. BHRC also employs a full-time project coordinator.

BHRC aims to:

- uphold the rule of law and internationally recognised human rights norms and standards;
- support and protect practicing lawyers, judges and human rights defenders who are threatened or oppressed in their work;
- further interest in and knowledge of human rights and the laws relating to human rights, both within and outside the legal profession;
- support and co-operate with other organisations and individuals working for the promotion and protection of human rights; and

As part of its mandate, BHRC undertakes legal observation missions to monitor proceedings where there are concerns as to the proper functioning of due process and fair trial rights. The remit of BHRC extends to all countries of the world, apart from its own jurisdiction of England and Wales. This reflects the Committee's need to maintain its role as an independent but legally qualified observer and critic.

Introduction

1. BHRC closely monitored the "Gezi Park" trial of sixteen leading civil society individuals in Turkey and conducted trial observations of this case, on various dates between June 2019 and February 2020.

2. The trial ostensibly ended on 18 February 2020 with the acquittal of nine defendants, although the case is not yet concluded against others who are based abroad. At the time of drafting this report, the Public Prosecutor has appealed the acquittals and this appeal remains unresolved.

3. Throughout the course of these proceedings, BHRC has repeatedly reported its concerns that the human rights and fair trial safeguards of the Gezi Park defendants have been violated in a number of fundamental aspects, including:

    - The bringing of proceedings for non-legitimate, political, purposes as part of a wider clamp-down on civil society and rights activists;

    - The abuse of pre-trial detention in order to deter and silence human rights defenders and civil society groups;

    - The issuing of an excessively long and arbitrary 657-page indictment that, despite its length, did not specify any evidence connecting the defendants with the allegations;

    - Perpetuating the pre-trial detention of defendant Osman Kavala, notwithstanding ECHR's ruling that he should be released immediately;

    - Disregarding procedural safeguards for fair trials through the adducing of important testimony in the absence of the defence;

    - Further perpetuating the detention of Osman Kavala following his acquittal, through various prosecutorial manoeuvres;

    - The bringing of disciplinary proceedings against the judges who delivered the verdicts of acquittal.

4. It is important to note that the concerns about the Gezi Park case encompass *all stages* of the proceedings; the use of pre-trial detention, the indictment, the trial itself and the reaction by the authorities to the acquittals. Consequently, although

this report details observations of the trial hearings, it is impossible to evaluate these without also looking at the wider ambit of the proceedings and also their aftermath.

5. Likewise, the acquittals themselves cannot be seen in isolation as a signifier of fair proceedings. They come in the wake of what were always, patently, misconceived and politically motivated allegations that will have had a huge effect on the lives and rights of the defendants, not least Osman Kavala who was in detention for more than 900 days in respect of them. The defendants have not only faced very serious accusations in high-profile proceedings but their life and careers will have been profoundly affected. Equally so, their families and colleagues.

6. Moreover, as the Commissioner for Human Rights pointed out in her submissions before the ECHR, proceedings such as these tend to have a chilling effect upon the work of rights activists, civil society groups and freedom of expression.

7. Indeed, although the drafting of this report follows in the wake of acquittals of the defendants on 18 February 2020, it is clear that there are still ongoing government machinations to suppress the rights and liberty of defendant Osman Kavala, who remains in detention.

8. In the view of BHRC, these continuing manoeuvres only serve to aggravate the conduct of the authorities following what were, on the evidence, intrinsically *baseless* charges.

9. Looking at the various elements of these proceedings *together,* it becomes apparent that the acquittals were the only small glimmer of light in what were otherwise arbitrary and oppressive proceedings that should never have been brought, or continued. The aftermath of the case, and the manoeuvres against Osman Kavala have only added to the sense of crisis in the application of the rule of law in Turkey and, indeed, may represent a new low watermark for it.

10. Depressingly, and to make matters worse, the reaction by the authorities to the verdicts of acquittal has been to launch disciplinary proceedings against the panel of trial judges.

11. This BHRC report therefore seeks to set out full chronology of these proceedings so that a wide picture emerges, and the extent to which there have been violations of rights and safeguards can be properly assessed.

12. The Defendants in the trial were:

- **Osman Kavala**, businessman and philanthropist, the chairman of the board of directors of Anadolu Kültür and founder or advisory board member of many civil society organisations.

- **Yiğit Aksakoğlu**, Turkish representative of Bernard van Leer Foundation, a Dutch philanthropic organisation focusing on early child development projects.

- **Ali Hakan Altınay**, deputy chair of Anadolu Kültür, executive board member of Terakki Foundation Schools and a founding member of educational institutions.

- **Ayse Mücella Yapıcı**, architect and secretary general of the Istanbul Architects' Chamber.

- **Ayşe Pınar Alabora**, actor.

- **Memet Ali Alabora**, actor and former president of Actor/Actress Union.

- **Çiğdem Mater Utku**, film producer, journalist and a consultant of Anadolu Kültür.

- **Gökçe Yılmaz**, Open Society Foundation Representative to Turkey.

- **Handan Meltem Arıkan**, novelist and playwright.

- **Hanzade Hikmet Germiyanoğlu**, education consultant and coordinator of Civil Society Development Centre.

- **İnanç Ekmekçi,** civil society professional working at civil society organisations on children's rights, refugees' rights, women's human rights and ecology.

- **Mine Özerden**, activist, film-maker and former worker at Anadolu Kültür.

- **Can Atalay**, lawyer.

- **Tayfun Kahraman**, academic and urban planner.

- **Yiğit Ali Ekmekçi**, Anadolu Kültür Executive Board Deputy Chair and Terakki Foundation Schools' Executive Board member.

- **Can Dündar,** journalist and former editor of Cumhuriyet newspaper.

13. The principal charge against the defendants consisted of attempting to overthrow the government by force and violence, contrary to Article 312 of the Turkish Criminal Code.

14. Article 312 § 1 of the Criminal Code provides:

> **"Anyone who attempts to overthrow the Government of the Republic of Turkey by force and violence or to prevent it, whether fully or in part, from discharging its duties shall be sentenced to aggravated life imprisonment."**

15. Having considered various sources of evidence, including its own observations of the trial and the decision of the European Court of Human Rights (ECHR) in the case brought by Osman Kavala, BHRC considers that there have been, at the very least, violations of Articles 5 § 1, 5 § 4 and 18 of the European Convention of Human Rights (Convention). Indeed, as detailed below, there were various other aspects of the trial process that indicated basic fair trial safeguards had not been followed.

16. BHRC have observed this case closely, appreciating the significance of the issues that it raised and the seriousness of the allegations. On 24 June 2019, therefore, BHRC Chair Schona Jolly QC[1] attended an initial trial hearing of the case at the 30th Serious Criminal Court at Silivri, outside Istanbul.

17. On 8 October 2019, BHRC Vice-Chair Stephen Cragg QC [2] attended a further hearing of the trial. On 24 December 2019, 28 January and 8 February 2020, BHRC member Kevin Dent QC [3]attended further trial hearings.

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[1] http://www.barhumanrights.org.uk/wp-content/uploads/2019/07/Gezi-Park-Statement_July-2019-2.pdf

[2] http://www.barhumanrights.org.uk/wp-content/uploads/2019/10/Gezi-Park-Statement_October-2019-updated.pdf

[3] https://www.barhumanrights.org.uk/wp-content/uploads/2020/01/BHRC-Trial-Observation-Report-Kavala-24-December-2019.pdf and https://www.barhumanrights.org.uk/wp-content/uploads/2020/02/BHRC-Trial-Observation-Report-Kavala-28-January-2020.pdf

18. At the final hearing on 8 February 2020, defendants Osman Kavala, Ayse Mücella Yapıcı, Yiğit Aksakoğlu, Çiğdem Mater Utku, Ali Hakan Altınay, Mine Özerden, Şerafettin Can Atalay, Tayfun Kahraman and Yiğit Ali Ekmekçi were acquitted. The case remains outstanding, however, in respect of the remaining defendants who had left Turkey prior to the trial.

Terms of Reference, Funding and Acknowledgements

19. BHRC was asked by ARTICLE 19 (an independent not-for-profit organisation dedicated to the promotion of freedom of expression in the pursuit for fundamental rights) to observe the trial. BHRC now shares a Memorandum of Understanding with ARTICLE 19, created in response to the deterioration in freedom of expression in Turkey. BHRC was funded by ARTICLE 19, through the financial assistance of the European Union, to carry out both trial observations which are the subject of this report. BHRC, however, conducted the trial observations and wrote this report on a pro bono basis. BHRC is grateful for the assistance provided by ARTICLE 19 in arranging the observations, in providing the services of a professional interpreter throughout the hearings, and in providing translations of written material as required.[2] For the avoidance of doubt, nothing in this document should be regarded as reflecting the position of the European Union.

Previous Trial Observations in Turkey

20. The mission builds upon BHRC's previous trial observations to assess and report on the compliance of the Turkish courts with international fair trial standards in cases concerning, for instance, journalists who were charged with serious terrorism offences in the wake of the failed attempted coup in July 2016. Grainne Mellon attended part of the trial of journalists from the *Taraf* newspaper in September 2016 and Pete Weatherby QC attended and reported on the trial of *Altan and Others v Turkey* in 2017, in which 17 journalists and other media workers were charged with serious offences relating to the failed coup. In 2018, Schona Jolly QC attended and reported on trial hearings in the Şahin Alpay & others v Turkey, the trial of journalists from Zaman newspaper. In 2019, Pete Weatherby QC attended and reported on the Selahattin Demirtaş v Turkey and Veysel Ok v Turkey trials of prominent politicians.

Context

Background: The Gezi Park events

21. The allegations concerned events that had taken place in Istanbul back in 2013 and protests concerning the planned redevelopment of Gezi Park in Istanbul.[4]

22. In September 2011, the Istanbul Metropolitan Municipal Council adopted a plan to pedestrianise Taksim Square in Istanbul. This plan included rebuilding barracks in order to create a shopping centre in the new premises. These barracks were to be built on the site of Gezi Park, one of only a very few green spaces in the centre of Istanbul. The proposals were unpopular with many, and various professional groups brought administrative proceedings in an attempt to have the project set aside.

23. In 2012, demonstrations were organised to protest against the planned destruction of Gezi Park. Platforms bringing together various associations, trade unions, professional bodies and political parties, including the "Taksim Solidarity" (Taksim Dayanışma) collective, were accordingly set up to coordinate and organise the protests.

24. Following the start of demolition work in Gezi Park on 27 May 2013, environmental activists and local residents occupied the park in an attempt to prevent its destruction. The protest movements were initially led by ecologists and local residents objecting to the destruction of the park. On 31 May 2013, however, the police intervened violently to remove persons occupying the park, leading to confrontations between the police and the demonstrators.

25. A sit-in at Gezi Park was restored after police withdrew from Taksim Square on 1 June 2013, and the park developed into something of a protest camp, with thousands of protesters in tents, organising a library, medical centre and food distribution. There was widespread criticism of the use of force by police against the protesters over the following days. Gezi Park was ultimately cleared by riot police on 15 June 2013.

26. Similar protests, in solidarity with the protestors at Gezi Park, emerged in other

[4]Kavala v Turkey ECHR 2019 (28749/18) paragraphs 15-22.

parts of the country, leading to largescale arrests. Then Prime Minster, Tayip Erdoğan was a vocal opponent of these protests.

27. According to Turkish Government figures[5], between 28 May and 25 September 2013, 3,611,208 persons had taken part in the protests. 5,513 individuals had been arrested and 189 had been placed in detention. According to their figures, 697 law-enforcement officers and 4,329 civilians had been injured, and four civilians and two police officers had lost their lives.

28. According to the Commissioner for Human Rights,[6] the Gezi Park events were triggered as a result of the what was perceived to be the excessive use of force against a small number of peaceful protestors trying to stop the cutting of trees in Gezi Park in Istanbul and the construction of a shopping centre on Taksim Square. According to the Commissioner for Human Rights, the Gezi events had also been marked by heavy-handed interventions by the authorities.

29. In making submissions before the ECHR, the Commissioner for Human Rights reported receiving large number of serious, consistent and credible allegations of human-rights violations committed by law-enforcement officials against peaceful demonstrators or bystanders. According to the Commissioner for Human Rights, the overwhelming majority of these allegations had not been effectively investigated by the Turkish judiciary on account of the long-standing pattern of impunity for the security forces in Turkey.

The 'Taksim Solidarity' trial

30. One feature of the Gezi Park trial was that defendant Ayse Mucella Yapici had already been tried and acquitted of offences arising from the Gezi Park events, being one of 26 defendants in the 'Taksim Solidarity' trial, in 2014-2015. Ayse Mucella Yapici faced charges of setting up a criminal organisation, inciting and participating in unlawful demonstrations, and refusing orders to disperse. Those charges had potentially attracted prison sentences of up to 13 years.[7]

[5] Kavala v Turkey ECHR 2019 (28749/18) at paragraph 18.
[6] Kavala v Turkey ECHR 2019 (28749/18) at paragraphs 20-22
[7] https://www.hrw.org/news/2014/06/11/dispatches-one-year-after-turkeys-gezi-protests-activists-trial

The origin of the Gezi Park proceedings and use of pre-trial detention

31. Osman Kavala was arrested in Istanbul on 18 October 2017. He was suspected of having committed two offences, under Article 312 of the Turkish Criminal Code (attempting to overthrow the Government in respect of the Gezi Park events) *and* Article 309 (attempting to overthrow the constitutional order in relation to the attempted coup of 15 July 2016).[8]

32. On 25 October 2017,[9] the Istanbul public prosecutor decided to extend Osman Kavala's custody by seven days, in accordance with Article 91 of the Code of Criminal Procedure ("CCP") and Articles 10 and 11 of Legislative Decree no. 684 on the measures taken in the context of the state of emergency following the attempted coup.

33. On 31 October 2017, Osman Kavala was questioned about the accusations against him by police officers from the anti-terrorist branch of the Istanbul Security Headquarters.[10]

34. On 1 November 2017, the public prosecutor's office called for Osman Kavala to be placed in pre-trial detention for "attempting to overthrow the constitutional order through force and violence" (Article 309 of the Criminal Code relating to the attempted coup) *and* for "attempting to overthrow the Government or to prevent, through force and violence, the authorities from exercising their functions" (Article 312 of the Criminal Code relating to the Gezi Park).

35. Despite various attempts by Osman Kavala to challenge this pre-trial detention, including an appeal to the Constitutional Court of Turkey, he remained in custody up until the point of his acquittal on 8 February 2020.

36. Various defendants were arrested on 16 November 2018 in relation to the Gezi Park events. Defendant Yiğit Aksakoğlu had been arrested on 1 November 2017. Various other defendants were placed in pre-trial detention at different stages. By 25 June 2019, however, when Yiğit Aksakoğlu was released from pre-trial

[8] Kavala v Turkey ECHR 2019 (28749/18) at paragraph 14
[9] Kavala v Turkey ECHR 2019 (28749/18) at paragraph 33
[10] Kavala v Turkey ECHR 2019 (28749/18) at paragraph 35

detention, all defendants apart from Osman Kavala had been released.

The Gezi Park indictment

37. On 19 February 2019, the Istanbul public prosecutor filed a bill of indictment in respect of the 16 defendants of having attempted to overthrow the government by force and violence within the meaning of Article 312 of the Criminal Code in relation to the Gezi Park events, and of having committed numerous breaches of public order – damaging public property, profanation of places of worship and of cemeteries, unlawful possession of dangerous substances, looting, etc.[11]

38. The bill of indictment in question is a voluminous document and BHRC previously observed in respect of it that:

> "At the heart of this 657-page indictment is the presumption that the Gezi Park protests were orchestrated by a single person or organisation. There is simply no evidence presented in the indictment to support that presumption, or that that person was any of the defendants. The indictment was described by Mr Kavala as a "fantastic fiction" in his statement to the Court on 24th June 2019. BHRC concurs with this assessment, not least because it frequently appears to tout conspiracy in place of any credible or substantive evidence. Arbitrary references to George Soros litter the indictment, yet no attempt appears to have been made to take evidence from him or about him. Instead, his name is used liberally to suggest that he was behind the Gezi Park protests, without any evidential basis for the allegation and seemingly in an attempt to deflect from an overall lack of concrete evidence against Mr Kavala and the other defendants."[12]

39. In the first part of the indictment, the public prosecutor sets out its version of the context underlying the Gezi events, to the effect that it would present elements which show that the Gezi insurrection had been organised by Turkish "distributors" trained by named Serbian "exporters" (who were professional revolutionaries), with financial support from the West.

40. The theory presented in the indictment was that the Gezi Park events had been

[11] Kavala v Turkey ECHR 2019 (28749/18) paragraphs 47-60.
[12] http://www.barhumanrights.org.uk/wp-content/uploads/2019/07/Gezi-Park-Statement_July-2019-2.pdf

planned in advance on the basis of well-defined scenarios for non-violent resistance, directed by individuals who were backed by international players, in particular George Soros.

41. The indictment provided a list of 198 types of non-violent actions which, it alleged, were part of a pre-defined plan and had been used during the Gezi events. The indictment concluded that the defendants had intended to generalise non-violent actions throughout Turkey and that there existed a parallel between the Gezi events and those in 2000 which had led to the overthrow of the Serbian government. The indictment stated:

> "In the light of this information, it is established that the Gezi insurrection was led and promoted by globalist structures which are likely to control armed terrorist organisations or illegal structures that appear to be legal ..., [which are] likely to manipulate the public in order to achieve their aim .... [In this connection], it is established that the Gezi insurrection was planned and staged by the defendants... In the current global situation, the fact that such events do not occur in countries which are considered as allies or strategic partners but which are governed by an anti-democratic regime or a monarchy confirms the validity of this argument."[13]

42. It was therefore, a highly *political* indictment which sought to place protests surrounding plans for redeveloping a park, and the expansion of the protests following police action against protestors, within the framework of a pre-planned insurrection against the government by foreign powers.

43. The second part of the indictment listed various acts that it accused the defendants of having committed prior to and during the Gezi Park events. It sought to show that the Foundation for an Open Society, to which Osman Kavala belonged as a board member, had provided financial backing for the events.

44. The indictment alleged that the ultimate aim had been to force the Turkish government to resign, under pressure from foreign countries and, if possible, to prepare the ground for triggering a civil war. The indictment, however, provided no evidence to indicate that this had occurred or that the defendants had been part of any such plan.

[13] Kavala v Turkey ECHR 2019 (28749/18) paragraph 49.

45. The indictment quoted from various telephone conversations, obtained through interception of communications by Turkish authorities, involving Osman Kavala and certain other defendants, to show they had acted in a coordinated manner in order to generalise purportedly non-violent action across the country, had controlled and directed the "Taksim Solidarity" collective, had organised meetings with several persons, including artists and politicians, had held meetings with individuals working for the European Union, the European Commission and the ECHR and had helped to organise exhibitions and round table meetings, as well as film and video recordings, with the aim of ensuring public support for the Gezi events.

46. As the ECHR were to observe in relation to the case, however, all of the activity described in the indictment was *lawful* activity by individuals exercising their Convention rights as part of a democratic civil society. None of the conversations described in the indictment indicated any orders or encouragement to commit violent acts, nor seek any overthrowing of the constitutional order by violence.

47. The indictment quoted from reports detailing various banking transactions by Osman Kavala's foundation Anadolu Kültür, and alleged that these documents showed that the company in question had made several bank transfers to individuals, commercial companies and NGOs working in the fields of art, human rights and minorities, and that it had received financial support from several foundations, international organisations and universities, such as the Civitas Foundation, the University of Columbia and the Council of Europe.

48. It is indeed somewhat remarkable that such payments to lawful civil society groups like those described were intrinsically cast in the indictment as part of an attempted violent insurrection.

49. The indictment referred to physical surveillance of Osman Kavala, which indicated he had met the legal director of the German Consulate and a member of the European Parliament on 26 July 2013, also that a telephone conversation had taken place with a former representative of the European Commission of the European Union. The indictment stated that during a telephone conversation with an academic, the applicant had also mentioned the visit of the Council of Europe Commissioner for Human Rights.[14]

[14] Kavala v Turkey ECHR 2019 (28749/18) paragraph 51

50. BHRC notes that although the indictment listed conversations that might be taken to be supportive of the Gezi Park protests, there were none that advocated violence, violent insurrection or support or encouragement for any violence within the protests.

51. The indictment also listed several acts which, it claimed, had been intended to put Turkey in an awkward position at international level, including:

    - the organisation of an exhibition in Brussels about the Gezi events;
    - the preparation of a report about the Gezi events, intended for submission to the European Parliament;
    - support for individual applications lodged with the ECHR concerning the use of tear gas during demonstrations;
    - telephone conversations about cooperation and the exchange of information with various bodies of the Council of Europe, including the Commissioner for Human Rights and the Secretariat General of the Council of Europe;
    - telephone conversations concerning several reports by Amnesty International.

52. In the view of BHRC, it is of great concern that an attempt was made in the indictment to criminalise what was, plainly, lawful conduct on behalf of the defendants in the exercise of their basic Convention rights of freedom of expression and association as part of a pluralistic and democratic society.

53. The indictment concluded:

> "... before the Gezi insurrection, known as the "Gezi Park events", all of the defendants had been trained with a view to overthrowing the government; they began to implement their plan in May 2013; legal and illegal structures, as well as illegal structures that were ostensibly legal and seemingly independent of each other, began to act by converging around a single aim; all the defendants sought to incite the public to take to the streets by organising so-called "non-violent" actions that were intended to gain public sympathy; they made numerous appeals and tried to increase participation in collective demonstrations by claiming that the police had intervened violently in the

demonstrations; their aim was to plunge the country and society into chaos, as had occurred during the 1960 and 1980 coups d'état, by providing left-wing terrorist organisations with a favourable environment and attempting to overthrow the government of the Republic of Turkey or to prevent it from exercising its functions; they very probably wished to force the Government to resign and to hold early elections, as in certain foreign countries; should this attempt fail, they intended to lay the groundwork for a civil war and a coup d'état, as in Syria and Egypt; the armed terrorist organisation FETÖ/PDY made similar attempts; after the Gezi insurrection had ended ... the armed terrorist organisation FETÖ/PDY took to the stage with the aim of achieving the same goal; in the light of the evidence in the case file, the suspects committed the offences with which they are charged."[15]

54. Thus, the indictment sought to cast legitimate lawful discussion about, and criticism of, the government within the framework of an attempt to plunge Turkey into a civil war, but without ever providing any evidence to associate the defendants with support of, or seeking to advance, any such aim.

55. On 4 March 2019, however, the bill of indictment was accepted by the court, which agreed to the defendants' committal for trial and thus beginning the trial process.

Proceedings before the European Court of Human Rights

56. On 10 December 2019, the ECHR issued judgment in a case brought by Osman Kavala (Kavala v Turkey ECHR 2019 (28749/18)). Although the proceedings were brought by this defendant only, the judgment provides an important *overall* assessment of the Gezi Park proceedings and, as such, contributes to BHRC's own analysis of the case.

57. Although BHRC makes its own independent assessments according to international human rights and fair trial standards, many of the conclusions reached by ECHR in its judgment mirror and amplify BHRC's concerns about the proceedings. Indeed, the defiant response to this ECHR judgment by the Turkish authorities has only exacerbated them.

58. Osman Kavala initiated lodged proceedings on 8 June 2018 and ECHR ruled on

[15] Kavala v Turkey ECHR 2019 (28749/18) paragraph 55

them on 10 December 2019, holding that Osman Kavala's rights had been violated in respect of Articles 5(1), 5(4) and 18 of the European Convention on Human Rights. It ruled that Osman Kavala's pre-trial detention had not been based on reasonable suspicion of an offence (Article 5 § 1), that there had not been any determination of the lawfulness of his detention within a reasonable time period (Article 5 § 4) and that the proceedings were brought for, political, reasons outside of the scope of legitimate Convention purposes (Article 18).

Article 5 § 1

59. Article 5 § 1 (c) of the Convention provides:

> "1. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> …
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so."

60. The ECHR reiterated that a person could be detained under Article 5 § 1 (c) only for the purpose of bringing him or her before the competent legal authority on *reasonable suspicion* of having committed an offence.[16] Also, that the term "reasonableness" means the threshold that the suspicion must meet to satisfy an objective observer of the likelihood of the accusations. Also, that it must *not* appear that the alleged offences themselves were related to the exercise of a person's rights under the Convention.[17] The ECHR noted that any deprivation of liberty should be in keeping with the purpose of Article 5, namely to protect the individual from arbitrariness.[18]

61. The ECHR observed that Mr Kavala had been placed in detention on what the authorities claimed was "strong suspicion" that he had committed two separate

[16] Kavala v Turkey ECHR 2019 (28749/18) paragraph 125
[17] Kavala v Turkey ECHR 2019 (28749/18) paragraph 128-9
[18] Kavala v Turkey ECHR 2019 (28749/18) paragraph 132

offences: attempting to overthrow the Government by force and violence, an offence under Article 312 of the Criminal Code (Gezi Park events), and attempting to overthrow the constitutional order through force and violence, an offence under Article 309 of the Criminal Code (The attempted coup in 2016).[19]

62. *The fact that the ECHR considered the lawfulness of Osman Kavala's detention on both accusations is crucial when assessing the events after he was acquitted in relation to the Gezi Park events on 18 February 2020, as described below.*

63. In making its assessment, the ECHR noted that during interviews with Mr Kavala during police custody, no questions had been put to him about his involvement in committing the acts of violence which had occurred during the Gezi Park events. However, the facts imputed Osman Kavala, which were used as the basis for the questions put to him in the interview and with which he was subsequently charged, were either legal activities, isolated acts which, at first sight, are unrelated to each other, or activities which were clearly related to the exercise of a Convention right. In any event, they were non-violent activities.[20]

64. Moreover, in the ECHR's view there was no evidence in the case file indicating that Osman Kavala had used force or violence, had instigated or led the violent acts in question or had provided support for such criminal conduct.

65. Regarding the relations between Osman Kavala and various NGOs referred to in the indictment, the ECHR noted that none of the parties dispute that the NGOs in question are *lawful* organisations which continue to conduct their activities freely In any event, the ECHR found no sign in the recorded conversations in question of any indication that Osman Kavala, in collaborating with other individuals, was seeking to transform peaceful demonstrations into a widespread and violent anti-Government insurrection.

66. In making its assessment, the ECHR found it could not overlook how many years had passed since the Gezi Park events and the opening of the investigation. Osman Kavala had been first arrested four years after the Gezi events. Turkey failed to submit any argument explaining this considerable lapse of time between the circumstances giving rise to the suspicions and the Osman Kavala's placement in detention. In addition, he was indicted and charged about five and a half years

[19] Kavala v Turkey ECHR 2019 (28749/18) paragraph 132
[20] Kavala v Turkey ECHR 2019 (28749/18) paragraph 146

after these events. However, it did not appear from the case file that, following the opening of the criminal investigation, the authorities had gathered any important *new* evidence that was likely to change the direction of this investigation or indicating that the Osman Kavala was the main instigator of these events.

67. In relation to the allegations regarding Osman Kavala's involved in the attempted coup in 2016, the ECHR noted that the evidence in the case file was insufficient to justify suspicion of his involvement. The prosecutor's office relied on the fact that he had maintained relationships with foreign nationals and that his mobile telephone and that of one individual in particular (Professor Henri Barkey) had emitted signals from the same base receiver station.

68. In the ECHR's opinion, it could not be established on the basis of the file that the Osman Kavala and the individual in question had had intensive contacts. Further, in the absence of other relevant and sufficient circumstances, the mere fact that the he had had contacts with a suspected person or with foreign nationals cannot be considered as sufficient evidence to satisfy an objective observer that he could have been involved in an attempt to overthrow the constitutional order.

69. In the ECHR's opinion, it is quite clear that a suspicion of attempting to overthrow the constitutional order by force and violence must be supported by tangible and verifiable facts or evidence, given the nature of the offence in question. However, it did not appear to the ECHR that Osman Kavala's deprivation of liberty was based on a reasonable suspicion that he had committed the offences.[21]

70. The ECHR concluded that, in the absence of facts, information or evidence showing that the he had been involved in criminal activity, Mr Kavala could not *reasonably* have been suspected of having committed the offence of attempting to overthrow the Government by force or violence.

71. Turkey was unable to demonstrate that Mr Kavala's detention was justified by reasonable suspicions based on an objective assessment of the acts. The ECHR, therefore, concluded that there had been a violation of Article 5 § 1 on account of the lack of reasonable suspicion that Mr Kavala had committed an offence.

72. The ECHR concluded, therefore, that there had been a violation of Article 5 § 1 of

[21] Kavala v Turkey ECHR 2019 (28749/18) paragraph 155

the Convention in the present case on account of the lack of reasonable suspicion that the applicant had committed an offence, in relation to **both** the Gezi Park events and the 2016 attempted coup.[22]

Article 5 § 4

73. Osman Kavala claimed that there had been a breach of his Article 5 § 4 Convention right to challenge the lawfulness of his pre-trial detention.

74. Article 5 § 4 of the Convention provides:

> "4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

75. On 29 December 2017, Mr Kavala lodged an individual application with the Turkish Constitutional Court challenging the lawfulness of his detention. Over one year and four months had elapsed between the lodging of the application and the date that Court published its deliberations. The Constitutional Court examined the case on 22 May 2019 and published the result of its deliberations on 23 May 2019. The final judgment was published on 28 June 2019.

76. ECHR noted that, where an individual's personal liberty was at stake, it applied very strict criteria in assessing the State's compliance with the requirement of speedy review of the lawfulness of detention. For sixteen months after being placed in detention, Mr Kavala had been detained without having been charged. Whilst ECHR acknowledged the heavy caseload of the Turkish Constitutional Court in the wake of the attempted coup, this could not provide any perpetual justification for a lack of speedy determination.[23]

77. The EHCR acknowledged the wider problem about the lack of a proper efficient review of detention, observing that, as the Commissioner for Human Rights pointed out, the extension of Mr Kavala's detention in this way could have a "dissuasive effect on the non-governmental organisations whose activities were related to matters of public interest".[24] The ECHR concluded that the proceedings by which the Turkish Constitutional Court had ruled on the lawfulness of Osman

[22] Kavala v Turkey ECHR 2019 (28749/18) paragraph 159
[23] Kavala v Turkey ECHR 2019 (28749/18) paragraph 185
[24] Kavala v Turkey ECHR 2019 (28749/18) paragraph 193

Kavala's pre-trial detention could not be considered compatible with the "speediness" requirement of Article 5 § 4 and, therefore, there had been a violation of the Article.

Article 18

78. Osman Kavala also claimed that there had been a breach of his Article 18 Convention right in that rights had been restricted for purposes other than those prescribed in the Convention. In particular, he submitted that his placement in detention had been intended to punish him as a critic of the Government, to reduce him to silence as an NGO activist and human-rights defender, to dissuade others from engaging in such activities and to paralyse civil society in the country.[25]

79. Article 18 of the Convention provides:

> "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."

80. The Commissioner for Human Rights made significant representations to ECHR on this aspect. She considered that the present case was a clear illustration of the increasing pressure on civil society and human-rights defenders in Turkey in recent years. This pressure had notably included a series of specific attacks by politicians and a general political discourse targeting civil-society activists, in particular by suggesting that reporting on alleged human-rights violations perpetrated by the authorities furthered the aims of terrorist organisations and was by extension an attack on the Turkish State.

81. According to the Commissioner, these statements frequently resulted in actions by public officials to restrict such work. For example, the police and local authorities had started to prevent NGOs, including Amnesty International, from visiting certain areas of the country following a statement by the President of the Republic in April 2016 whereby NGOs publishing reports on the human-rights situation needed to be "countered".

82. In addition, the Commissioner pointed out that severe restrictions had also been

[25] Kavala v Turkey ECHR 2019 (28749/18) paragraph 197

imposed on the day-to-day functioning of NGOs, including, for example, an indiscriminate and indefinite ban in Ankara on all public events focusing on the human rights of LGBTI persons. She noted that this ban was being maintained despite the lifting of the state of emergency.

83. The Commissioner's Office had also published several statements on the situation of human-rights defenders in Turkey in 2017, for example concerning the sentencing of M.Ç., another partner of the Commissioner's Office; the detention of T.K., the Chair of Amnesty International Turkey; or the unjustified arrest and criminal proceedings against eight human-rights defenders participating in a digital security and information management workshop in Istanbul in July 2017. The Commissioner also drew the Court's attention to the arrest on 16 November 2018 of thirteen prominent academics and human-rights defenders.[26]

84. *Again, in BHRC's view it is important to note that the ECHR's determination on Article 18 concerned investigations into both the Gezi Park events and the 2016 attempted coup*.[27]

85. In considering whether the prosecution was being brought in pursuit of non-legitimate law enforcement aims, the ECHR reiterated its conclusion that the measures against Mr Kavala had not been justified by reasonable suspicion based on an objective assessment of the alleged acts, although this was not *in itself* sufficient to establish a violation of Article 18. [28]

86. Rather in the EHCR's view, from the outset, in the investigating authorities had *not* been primarily interested in Mr Kavala's involvement in the public disorder connected to the Gezi Park events. During the police interview, Mr Kavala had been asked many questions which had no connection with these events. Equally, some of the questions put to him had concerned his meetings with representatives of foreign countries, his telephone conversations with academics, journalists, NGO representatives, or the visit of an EU Turkey Civic Commission delegation.[29]

87. The ECHR also noted[30] that:

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[26] Kavala v Turkey ECHR 2019 (28749/18) paragraph 210-212.
[27] Kavala v Turkey ECHR 2019 (28749/18) paragraph 221
[28] Kavala v Turkey ECHR 2019 (28749/18) paragraph 218
[29] Kavala v Turkey ECHR 2019 (28749/18) paragraph 222
[30] Kavala v Turkey ECHR 2019 (28749/18) paragraph 223-231

- The 657-page bill of indictment did not specify clearly the facts or criminal actions on which Mr Kavala's criminal liability in the GeziPark events had been based;

- There was nothing in the case file to indicate that the prosecuting authorities had had objective information in their possession enabling them to suspect the Mr Kavala in good faith at the time of the Gezi events;

- The prosecution documents referred to numerous completely lawful acts that were related to the exercise of a Convention right and had been carried out in cooperation with Council of Europe bodies or international institutions;

- Those documents also referred to ordinary and legitimate activities on the part of a human-rights defender and the leader of an NGO, such as conducting a campaign to prohibit the sale of tear gas to Turkey or supporting individual applications;

- Mr Kavala had been arrested more than four years after the Gezi events and more than a year after the attempted coup on charges related to these, much earlier, events;

- The charges had been brought following two speeches given by the President of the Turkish Republic in which Mr Kavala's name had been cited. There was a correlation between, on the one hand, the accusations made openly by the President and, on the other, the wording of the charges in the bill of indictment;

- Those elements corroborated Mr Kavala's argument that his initial and continued detention had pursued an ulterior purpose, namely to reduce him to silence as a human-rights defender;

- Moreover, the fact that the bill of indictment referred to the activities of NGOs and their financing by legal means, without however indicating its relevance also support that assertion.

88. The ECHR also referred to the concerns expressed by the Commissioner for Human Rights and the third-party interveners, who considered that Mr Kavala's detention was part of a wider campaign of repression of human-rights defenders in Turkey.

89. Consequently, the ECHR found it established *beyond reasonable doubt* that the measures complained of in the present case pursued an ulterior purpose, contrary to Article 18 of the Convention, namely that of reducing the Mr Kavala to silence. Further, it considered that the contested measures were likely to have a dissuasive effect on the work of human-rights defenders.[31]

90. It found that the restriction of Mr Kavala's liberty had been applied for purposes other than bringing him before a competent legal authority on reasonable suspicion of having committed an offence, as prescribed by Article 5 § 1 (c) of the Convention. There had therefore been a breach of Article 18 of the Convention, taken in conjunction with Article 5 § 1.

ECHR ruling on remedy

91. In terms of the remedy for the violation of these rights, the ECHR considered its powers of remedy under Article 41.

92. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

93. The EHCR ruled that Article 41 applied in the category of cases, of which Mr Kavala's was an example, where the nature of the violation found is such as to leave no real choice as to the measures required to remedy it. It stated[32]:

> "…it considers that any continuation of the applicant's pre-trial detention in the present case will entail a prolongation of the violation of Article 5 § 1 and of Article 18 in conjunction with this former provision, as well as a breach of the obligations on respondent States to abide by the Court's judgment in accordance with Article 46 § 1 of the Convention."

94. Having regard to the particular circumstances of the case and the grounds on which the ECHR had based its findings, it ruled that the Government of Turkey: "**must take every measure to put an end to the applicant's detention and to**

[31] Kavala v Turkey ECHR 2019 (28749/18) paragraph 232
[32] Kavala v Turkey ECHR 2019 (28749/18) paragraph 239-240

secure his immediate release".

95. This judgment of the ECHR provided both an important backdrop to the Gezi Park trial and a forceful critique of the proceedings as a whole, finding it established beyond reasonable doubt that the proceedings had been brought for an ulterior and illegitimate purposes, namely that of reducing Osman Kavala to silence. Further, it considered that the contested measures were likely to have a dissuasive effect on the work of human-rights defenders. BHRC shares this view.

96. On 12 May 2020 the Grand Chamber of the ECHR rejected a referral made by Turkey for the case to be reconsidered under Article 43 of the European Convention on Human Rights. In accordance with protocol, the panel of five judges did not give their reasons for rejecting the referral. Now that the referral has been rejected, the decision of ECHR last December is, on any analysis, final.

Hearings observed

Hearings of 24 and 25 June 2019

97. BHRC Chair Schona Jolly QC attended the first hearings of this case on 24 and 25 June 2019 at the 30th Serious Crime Court at Silivri, outside Istanbul. BHRC reported [33] at the time that:

> "The "Gezi Park" trial forms part of a chilling clampdown on human rights defenders and civil society in Turkey".

98. BHRC reported that Osman Kavala been in detention, by then, for over 21 months and noted that, whilst the release on bail of Yiğit Aksakoğlu on 25 June 2019 had been a positive development, it remained a matter of serious concern that Osman Kavala continued to be detained in respect of an indictment which was gravely flawed.

99. BHRC noted the lack of evidence to support the theories in the indictment:

> "At the heart of this 657-page indictment is the presumption that the Gezi Park protests were orchestrated by a single person or organisation. There is simply no evidence presented in the indictment to support that presumption, or that that person was any of the defendants. The indictment was described by Mr Kavala as a "fantastic fiction" in his statement to the Court on 24th June 2019. BHRC concurs with this assessment, not least because it frequently appears to tout conspiracy in place of any credible or substantive evidence. Arbitrary references to George Soros litter the indictment, yet no attempt appears to have been made to take evidence from him or about him. Instead, his name is used liberally to suggest that he was behind the Gezi Park protests, without any evidential basis for the allegation and seemingly in an attempt to deflect from an overall lack of concrete evidence against Mr Kavala and the other defendants. BHRC concludes that the continued detention of Mr Kavala appears to be arbitrary and unjustified.

100. Moreover, BHRC noted that the length of Osman Kavala's detention must be

[33] http://www.barhumanrights.org.uk/wp-content/uploads/2019/07/Gezi-Park-Statement_July-2019-2.pdf

viewed in the context of a worsening situation for human rights defenders and civil society in Turkey since the attempted coup.

101. BHRC further noted that:

> "Moreover, the continuation of a trial on the basis of this obviously flawed indictment contributes towards an assessment that criminal proceedings are being used in a retaliatory and intimidatory manner, and as part of the narrowing of an increasingly hostile space for human rights defenders in Turkey.

102. At this tranche of the trial, defendants gave oral statements in response to the charges and the prosecutor's request for aggravated life sentences. These statements began on 24 June 2019 and continued the following day.

Statement of Osman Kavala

103. Osman Kavala stated to the court that he had always supported democracy and that the charges were a fantastic fiction. He stated that he had never supported governmental change by other means than democratic elections. He stated that he had supported democracy through his business life and had co-founded several non-governmental organizations, through which he defended values supporting support peace, dialogue and reconciliation among communities. He indicated that keeping Gezi as a park was in accordance with the public interest and that he felt sorrow for those who lost their lives in the incidents there. He stated that he was in no way any different than hundreds of thousands of people who took part in Gezi incidents and asked for his release and acquittal.

Statement of Yiğit Aksakoğlu

104. Yiğit Aksakoğlu stated that as an expert in the field of civil society and social development, he had never been in favour of an anti-democratic government and stressed that civil society groups exclude violence as a method of change in society. He said that there was no crime set out in the 657-page indictment.

Statement of Ayse Mücella Yapıcı

105. Ms Yapıcı, Secretary of the Chamber of Architects İstanbul Branch's Advisory Board on Environmental Impact Assessment, stated that it was the second time that she was being tried on essentially the same charge. She also stated that

there was no evidence to support the accusations, that peaceful demonstrations are a right and it is not a crime to call upon the government to resign.

Statement of Çiğdem Mater

106. Ms Mater stated to the court that she was charged on the basis that she wanted to film a movie about Gezi Park. She also expressed that the 657-page indictment is based on tapes of telephone conversations that were acquired by illegal means and in violation of her personal rights. She stated that the indictment had, wrongly, indicated that she had directed a film about Gezi Park. If the indictment were a movie script, she said, it would be rejected due to errors of logic.

Statement of Ali Hakan Altınay

107. Mr Altınay said that he had read the indictment but had difficulty in understanding what he was charged with, and that there was no evidence to substantiate the allegations. He stated that it should not be so easy to demand aggravated life sentences and that his alleged crime was to go to Gezi Park three or four times as an observer. He also stated that there is no evidence in the indictment indicating what support, if any, the Open Society Foundation gave for the continuation of Gezi protests.

108. On 25 June 2019, other defendants made statements to the court in support of their defence.

Statement of Can Atalay

109. Lawyer Can Atalay stated that the indictment was an attempt to smear one of the most honourable social incidents in the history of Turkey.

Other statements

110. Tayfun Kahraman, Mine Özerden and Yiğit Ali Ekmekçi all made statements in their defence, stressing that the Gezi Park protests were not something to be afraid of or ashamed but represented legitimate and non-violent protest for which they were proud. Each defendant indicted that the indictment presented no evidence of any offence.

111. At this hearing, the court ruled that Mr Aksakoğlu was to be released, whereas Osman Kavala's detention was to continue.

Statement of concern issued by BHRC following the hearing

112. Following the hearing, BHRC issued a statement[34] emphasising the pivotal role played by civil society in a democracy:

> "It epitomises the need for the internationally and constitutionally protected rights of freedom of assembly and expression to be safeguarded by all the component parts of a democratic state, including the judiciary. The attempt to cast peaceful Gezi Park protestors within the net of violent terrorism, retrospectively and without recourse to the evidential threshold required of the Prosecutor, has a chilling effect on the present and future of adherence to international laws and standards, as well as for civil society in Turkey today."

113. BHRC noted the significance of Article 18 ECHR in preventing restrictions on activities permitted under the Convention from being applied for any purpose other than those for which they have been prescribed (this was prior to the ECHR's December 2019 ruling):

> "BHRC recalls that the European Court of Human Rights, in Selahatin Demirtaş v Turkey (No.2), found a violation of Article 18 in conjunction with Article 5(3) since the predominant purpose of the applicant's detention was to stifle pluralism in Turkey and to limit freedom of political debate at the very core of democracy and so breached art 18.
>
> BHRC considers that detention of Mr Kavala in the circumstances described above may amount to a similar violation of Article 18 ECHR in conjunction with Article 5 and condemns the use of terror proceedings and detention as reprisals against human rights defenders, whether they be lawyers, journalists, judges or civil society. The extraordinary indictment, and the length of Mr Kavala's detention all lend the clear impression that the proceedings are indeed being so abused."

114. BHRC stated that it considered that there was no proper basis for Osman Kavala to remain in detention and called for him to be released immediately.

115. BHRC stated that the attempt to cast peaceful Gezi Park protestors within the

[34] http://www.barhumanrights.org.uk/wp-content/uploads/2019/07/Gezi-Park-Statement_July-2019-2.pdf

net of violent terrorism, but without recourse to proper evidence, shows a chilling disregard for international laws and standards which safeguard rights of freedom of assembly and expression. These are rights that should be protected by all the component parts of a democratic state, including by the judiciary.

Hearing of 8 October 2019

116. BHRC Vice-Chair Stephen Cragg QC observed this hearing on behalf of BHRC. At this hearing, all of the Defendants present were questioned, briefly, by the court as to their involvement in the Gezi Park protests in May 2013 and their alleged role in organising the protests.

117. The questions were based on the 657-page indictment which presumed that the protests were orchestrated by a single person or organisation. In the view stated by BHRC's following the hearing[35]:

> "…after hearing the questions asked by the court, there is simply no evidence presented in the indictment to support that presumption. Mr Kavala was asked a number of questions about his links with George Soros, who he accepts that he has met. As BHRC has previously mentioned, arbitrary references to George Soros litter the indictment, suggesting that he was behind the protests, but without any evidential basis for the allegation.
>
> The evidence given to the court by all the present defendants reiterated the common feature of their defence statements which emphasise their role within peaceful, legitimate protest."

Composition of the Court

118. The previous hearing of the case had been in July 2019. The trial on 8 October 2019, however, was presided over by a different judge to that hearing (there was one presiding judge amongst a panel of three). Doubts over the independence of the court panel were expressed at the hearing, including by defendant Can Atalay. Giving oral evidence at court in his defence, Mr Atalay commented that the changes in the judicial panel made by the Council of Judges

[35]http://www.barhumanrights.org.uk/wp-content/uploads/2019/10/Gezi-Park-Statement_October-2019-updated.pdf

and Prosecutors were indications of the lack of judicial independence.

Hearing of 24 December 2019

119. Kevin Dent QC attended this hearing on behalf of BHRC. This was the first hearing following the ECHR decision of 10 December 2019. In the light of its ruling that Osman Kavala be released from pre-trial detention "immediately", there were legitimate expectations that he would be released by or on this date.

120. However, the 24 December 2019 hearing began without any acknowledgment of the 10 December 2019 decision by the ECHR. Instead, two prosecution witnesses were called and questioned.

Prosecution witnesses

121. Firstly, **Ercan Orhan Aydın**, the Chief of Security Branch, gave evidence confirming that he had not seen Osman Kavala present at Gezi Park during the protests and was unaware of his role, if any, in the organisation of the protests. He could not say that any of the Defendants carried out a violent act and had not seen Mr Kavala involved in any violence against police. He had not seen any of defendants making press statements provoking the crowd to carry out violent acts.

122. Afterwards, **Hasan Gül** from the İstanbul Security Branch was called to the witness stand and confirmed he knew Osman Kavala's name not from any actions, but from general knowledge. He was aware of Mr Kavala's involvement in NGOs but did not know where he was during the Gezi Park protests. He had not seen Mr Kavala involved in any violent action.

123. In its interim report following the hearing, BHRC observed[36] that neither of these key witnesses were able to provide any evidence to support the prosecution contention that the Defendants were involved in organising the either the protests or any violent acts. On the contrary, both stated that they were unaware of Mr Kavala's or the other Defendants' roles, if any, in the protests.

[36] https://www.barhumanrights.org.uk/wp-content/uploads/2020/01/BHRC-Trial-Observation-Report-Kavala-24-December-2019.pdf

124. In its interim trial report, BHRC stated:

> "The testimony of these witness only reinforces BHRC's view that there is simply no evidence to support the prosecution's case that Mr Kavala and the other Defendants had attempted to overthrow the Government and constitutional order, through force and violence. The testimony of Mr Aydin and Mr Gul also only strengthens the correctness of the ECHR's assessment that the facts do not support even reasonable suspicion that Mr Kavala had committed an offence."[37]

125. After these witnesses had given evidence, by way of response the Defendants took turns to address the Court with their observations on the testimony given by the two officers.

126. Osman Kavala said, "The witnesses have provided no information indicating that I took part in any act of violence, that I provoked any such act, or that I was a director of the Gezi Events."

127. Other Defendants stated that these witnesses' evidence showed that the indictment is groundless, that the activities they were involved with were an exercise of their basic rights and that the charges should be dropped.

Defence oral submissions

128. Emphasizing that his request for released had been rejected 26 times, Osman Kavala also submitted that the indictment did not disclose any evidence other than his involvement in non-violent lawful activity.

129. Osman Kavala's lawyers stated that the ECHR decision of 10 December 2019 had already been translated into Turkish, and approved by a Notary. In the light of the ECHR decision, they submitted that Mr Kavala should be released immediately as specified in the ECHR decision. In their submissions, they relied extensively on the ECHR ruling and the view expressed in the ruling that the prosecution lacked any evidence to provide reasonable suspicion of an offence. They noted that Turkey's representative judge sitting on the ECHR had been in

[37] https://www.barhumanrights.org.uk/wp-content/uploads/2020/01/BHRC-Trial-Observation-Report-Kavala-24-December-2019.pdf

agreement with the ruling, to the extent that this judge had agreed that there had been a violation in respect of Articles 5 § 1 and 5 § 4.[38]

130. Defence lawyers stated that, in light of the ruling under Article 18, that the prosecution was being pursued for reasons outside of legitimate Convention reasons. If the trial were to continue, therefore, it would now be a political trial and thereafter would be conducted accordingly.

Ruling on Mr Kavala's detention

131. Following a short adjournment, the Court then announced its decision. It stated that the Court considered it was bound by the ECHR ruling, that it would be implemented but that it had not yet been approved by the Ministry of Justice. The Court ruled that Osman Kavala would remain in detention until such time as the decision had been approved.

132. In BHRC's view, the decision of the ECHR had already clearly and unequivocally stated that Mr Kavala should be released *immediately*. It was important that this decision be carried out forthwith, else this will constitute both a further violation of his Convention rights and have the effect of further eroding confidence in the observance of rule of law in Turkey.

Worrying developments

133. BHRC noted that at the 24 December 2019 hearing there were other developments that added to BHRC's already grave concerns about the proceedings.

134. For instance, despite objections from the lawyers for the defendants, the Court acceded to the request of the Ministry of Treasury and police officer Mevlüt Saldoğan to join the proceedings as additional complainants in the case. Mr Saldoğan is known as one of the police officers involved in the unlawful killing of protestor Ali İsmail Korkmaz, during the wider nationwide Gezi Park protests in the city of Eskişehir on 10 July 2013.

135. The indictment had originally been brought in the names of over 300 complainants, including the Turkish Prime Minister Tayip Erdoğan and his

[38] See 'PARTLY CONCURRING AND PARTLY DISSENTING OPINION OF JUDGE YÜKSEL' Kavala v Turkey ECHR 2019 (28749/18)

entire cabinet. In the context of a public prosecution, the BHRC can perceive no additional legitimate legal objective for the inclusion of additional complainants.

136. Instead, their addition at that stage strongly supported other factors indicating that the criminal proceedings brought against these 16 defendants have been brought for political rather than legitimate legal reasons, supporting the ECHR's ruling that there had been a violation of Article 18.

137. There were also concerns about the court's indication at this hearing that the next witness to give evidence, Murat Pabuç would be doing so in private and in the absence of the Defendants and their lawyers. Mr Pabuç was understood to the original informant in the case and, indeed, had been referred to in the ruling of the ECHR. The ostensible reason given for his testimony being taken in private was because he suffered from some psychological problems. Hearing evidence in private gave rise to clear concerns as to whether this represents a violation of basic Article 6 rights to a fair and public hearing.

138. BHRC commented following the hearing[39] that:

> "Mr Kavala has still not been released notwithstanding that it is now over six weeks since the ECHR's unequivocal ruling on 10 December 2019. BHRC considers that the continued detention of Mr Kavala is arbitrary, unjustified and in clear, unacceptable, defiance of the European Court of Human Rights…
>
> The continuation of this trial in the manner that we have described, the failure to release Mr Kavala from detention and the prosecution's call for aggravated life sentences underline and heighten our assessment that these criminal proceedings are being used in a retaliatory and intimidatory manner.
>
> The attempt to cast peaceful Gezi Park protestors within the net of violent terrorism, retrospectively and without recourse to the evidential threshold required of the Prosecutor, has a chilling effect on the present and future adherence to international laws and standards, as well as for civil society in Turkey. So, too, does the failure to heed and follow the judgment of the European Court of Human Rights."

[39] https://www.barhumanrights.org.uk/wp-content/uploads/2020/01/BHRC-Trial-Observation-Report-Kavala-24-December-2019.pdf

139. BHRC stated that there was no proper basis for Mr Kavala to remain in detention and called for him to be released immediately. In addition, it called upon the Turkish authorities to drop what was plainly a meritless prosecution and one which threatened to further erode confidence in the application of the rule of law in that country.

The hearing of 28 January 2020

140. Kevin Dent QC attended this hearing on behalf of BHRC.

141. As at previous hearings, BHRC noted that the Istanbul 30th Serious Criminal Court at Silivri was marked by an overwhelming security and military presence. There were large numbers of police in full riot gear present, soldiers carrying lengthy batons and even a tank outside the court building. Inside the court room, there was a cordon of soldiers and a large security presence.

142. Whilst it is of course a matter for the Turkish authorities to maintain the security of the courtroom and staff, BHRC expressed concerns about the level of armed security deployed in these proceedings. Apart from anything else, this overwhelming military presence may create an atmosphere suggesting that the defendants are so dangerous as to merit this response, which does not seem compatible with the presumption of innocence enshrined in Article 6(2). Given that the Defendants are made up of writers, filmmakers and members of civil society, the level of security presence was disproportionate.

Continued detention of Osman Kavala

143. Osman Kavala was produced from custody, still being held in pre-trial detention. The judges indicated at the outset that the decision of the ECHR on 10 December 2019 was in contradiction with the decision of the Turkish Constitutional Court and 'not yet finalised'.

Reactions to evidence given in private by Murat Pabuç

144. The hearing continued with submissions by various defence lawyers regarding the testimony given to the Court on 25 December 2019 by witness Murat Pabuç in closed session, in the absence of the defendants and their lawyers. The ostensible reason provided by the Court for this measure was because the witness had claimed to be fearful for his life were the testimony not taken in private.

145. Numerous defence lawyers called for the decision to hear this evidence in private to be reversed, submitting that it was contrary to a number of Articles of the Turkish Penal Code. They also argued that the decision to hear the witness in private on the basis that he was in fear was:

- Contrary to basic fair trials standards;
- Significant, given the importance of the witness in the context of the case overall as his status as an original complainant;
- Undermined by the witness himself seeking to make contact with some defence lawyers through LinkedIn;
- Puzzling in that he had not sought police protection;
- Not properly explained;
- Contradicted by the high level of safety and security within the Court;
- Represented an unwarranted attack of the integrity of the Defence lawyers.

Joint statement of the Turkish Bar Associations

146. Indeed, one of the lawyers, Head of the Istanbul Bar Association Mehmet Durakoğlu, presented to the Court a joint statement on behalf of a number of Turkish Bar Associations nationwide, condemning the decision to hear this evidence in closed hearing as representing an attack on the Defence Bar that undermined their role in safeguarding the rights of accused.

147. BHRC considers that this joint statement reflected widespread concern by lawyers and rights defenders in Turkey about the lack of observance of proper legal processes. It is noteworthy that the joint statement came from Bar Associations from different parts of the country unconnected, on the face of it, to the Gezi Park proceedings, indicating that the proceedings in Silivri had an impact that extended far beyond that particular case. The joint statement can be found at Annex 1.

The significance of Murat Pabuç as a witness

148. The significance of Mr Pabuç as a prosecution witness used to support the

prosecution's general theory, that Osman Kavala and others had organised the Gezi Protests in 2013 and with the aim of overthrowing the state by violence, emerged during the hearing. One of the judges read parts of the transcript of the testimony given by the witness in private on 25 December 2019. It included an account to the effect that:

- During the Gezi Protests, he and others were given gas masks at a restaurant (Cezayir) associated with Osman Kavala. The gas masks came from abroad as there was a foreign postage label on the box of gas masks.
- There were 8-10 people gathered together at this point, he hadn't remembered the names of the people but they were the names on the indictment.
- The gas masks were from abroad and only to be given to the leaders of the protest.
- He had subsequently kept the mask as a souvenir but had brought the gas masks to the prosecutor in February 2018.

149. BHRC notes that there are a number of aspects of his account that, at the very least, called for close scrutiny such as why the witness kept the gas mask for five years before passing it to the authorities around the time when the indictment was being prepared. Equally, the ECHR noted in its ruling that he had earlier apparently recanted on any suggestion that Osman Kavala was part of on an international conspiracy regarding the Gezi Park incidents.[40]

150. It was therefore highly important, particularly in a trial of this gravamen, that the lawyers for the accused had the opportunity to challenge the account given by this witness in open court. If, as was indicated, the witness has certain psychological difficulties, it becomes even more important that his account can be carefully tested.

151. It is a matter for the Court to ensure that any challenge to the testimony of a witness can be conducted in a fair way, including fairness to a witness who may be vulnerable. BHRC sees no reason, however, why this witness could not have been heard in open proceedings under careful case management and consider

[40] Kavala v Turkey ECHR 2019 (28749/18) at paragraph 109.

this failure to do so was incompatible with the Defendants' right to a fair trial. Article 6(3)(d) states that everyone charged with a criminal offence has as, a minimum, the right to examine or have examined witnesses against him. This has manifestly been breached in these proceedings.

152. BHRC also notes that the significance of Murat Pabuç's testimony is underlined by the various references to his complaint in the ECHR's decision.[41]

153. This breach was exacerbated by the defence apparently not being provided with an audio or video recording of the evidence of Murat Pabuç, rather only a transcript of it.

Submissions regarding additional complainant Murat Saldoğan

154. There were submissions by the defence seeking a reversal of the decision announced at the hearing on 24 December 2019 that a notorious police officer, Murat Saldoğan who had been jailed for his part in kicking to death Gezi protestor Ali Ismail Korkmaz, would be added to the long list of complainants.

155. The injury Murat Saldoğan claimed he had suffered included that to his foot, whilst kicking protester Mr Korkmaz to death, and to the damage to his career and family life following his conviction. These submissions caused the mother of the deceased protestor, who was present, to rise and address the Court from the public gallery, in obvious distress.

156. Defence submissions regarding Murat Saldoğan included the comment that the move had a bearing upon whether the judges were conducting the case in a fair way compatible with the presumption of innocence; that the decision to add as an 'injured party' or victim a man convicted of killing a Gezi protestor amounted to whitewashing and condoning all police violence that took place during the Gezi Park events.

157. As indicated above, BHRC perceives no legitimate legal reason for Murat Saldoğan to be added to the already long (300+) list of complainants in the case. Indeed, the inclusion of Mr Saldoğan was extraordinary and underlined the growing sense that ordinary prosecutorial objectives had been become overridden in the case. This move was, moreover, consistent with the ECHR's

[41] Kavala v Turkey ECHR 2019 (28749/18) at paragraphs 34, 53, 62, 109, 115, 147-8 and 227.

ruling on 10 December 2019 in relation to Article 18 that the prosecution had not been brought to pursue legitimate aims but to subdue and suppress activists and rights defenders.

Submissions on recusal of the panel judges

158. A number of the defence lawyers made submissions to the effect that, by virtue of the matters referred to above and the continued refusal of the Court to release Osman Kavala in accordance with the decision of the ECHR, the Court was no longer functioning in accordance with the law and that the panel of three judges should recuse themselves.

Ruling following submissions

159. Following a short adjournment, the Court then announced its decisions on the submissions, that:

- The decision to hear the evidence of Murat Pabuç in private stood;
- The addition of new complainants including Murat Saldoğan was confirmed;
- The petition for the judges to recuse themselves was rejected.

Response by defence counsel

160. Immediately following these rulings, a defence lawyer informed the Court on behalf of all the defence lawyers that, as the judges had ruled that evidence of Murat Pabuç would not be withdrawn, they would not further participate in the hearing. The defence lawyers walked out of the Court, save for lawyer Hurrem Sonmez who represented some of the defendants based abroad and absent from the proceedings.

161. On the withdrawal of the defence lawyers, there was applause from the large public gallery at the rear of the courtroom. The public were then removed from the Court, following a hiatus during which the departing lawyers complained to the military and security staff who had surrounded the departing members of the public that there was no right to evict members of the public in those circumstances. Eventually the gallery was cleared.

Continuation of the hearing in the absence of defence lawyers and public

162. The proceedings then continued in the absence of the defence lawyers and public, with only the political and international observers present to follow the proceedings.

163. Osman Kavala was asked by the judges for his observations on the testimony of Murat Pabuç but stated that, because the statement had not been taken in accordance with the law, he could not comment.

164. At this point the CHP party MP and lawyer Sezgin Tanrikulu (who is also Chair of the Turkish Parliamentary Committee on Human Rights) addressed the Court and indicated that it was illegal to continue to question a defendant in the absence of his lawyers in a case of this severity. He was told by the judges to be quiet and eventually told to leave the Court. Soldiers then approached Mr Tanrikulu in order for him to be removed, following which he walked out of the courtroom.

165. BHRC expressed concerns about an MP and Chair of the Turkish Parliamentary Committee on Human Rights being surrounded by soldiers and then removed from a courtroom in these circumstances, for doing little more than expressing to the Court views about the serious issue about the legality of continuing proceedings without lawyers being present.

166. Following a further short adjournment, the Court resumed and Osman Kavala was again asked for his response to Murat Pabuç's testimony, to which he (and the other defendants present when asked) indicated he would not comment in the absence of his lawyers.

Submissions made by Osman Kavala concerning his release

167. Osman Kavala then made submissions concerning his continued detention, to the effect that:

- The ECHR ruled that the indictment contained no evidence that he had organised and financed the Gezi protests. They had ruled that this to be a meritless case which lacked reasonable suspicion of a crime.

- To deny a person their liberty without an evidential basis is a clear violation of the European Convention on Human Rights.

- The ECHR had declared that he should be immediately released and it was, therefore, a further violation of his right to a fair trial that the Court had declared that the ECHR decision is 'not final.'

- The behaviour of this court shows complete disregard of the fact that the liberty of the person is safeguarded by the constitution and the European Convention.

168. Following these submissions, MP Sezgin Tanrikulu re-entered the courtroom and was confronted by security staff. He called out to the judges that, as an MP and Chair of the Human Rights Committee in parliament, he could not be asked to leave the Court by military personnel.

169. The proceedings at this hearing concluded with the judges' ruling that;

- The addition of the new Plaintiffs would remain;

- They considered the ECHR decision calling for Osman Kavala to be released was 'not final' and, in the interim, he would not be released.

Statement by BHRC following the hearing

170. In its interim trial report following the hearing, BHRC stated that[42]:

> "The proceedings on 28 January 2020 represented a new low for this case, involving the confirmation of a police officer jailed for killing a protestor as an 'injured party' in the proceedings and the acceptance by the Court of testimony by a crucial witness given in closed session without proper testing by the defence.
>
> Overshadowing even those events was the continuing refusal of the Court to implement the clear and unequivocal ruling of the ECHR on 12 December 2019 that Osman Kavala be released. There is a fear that Turkey will not abide by the ruling and, instead, may seek to conclude the trial before the decision has been implemented. Were this to occur, this would seriously undermine Turkey's reputation for the observance of the rule of law."

[42] https://www.barhumanrights.org.uk/wp-content/uploads/2020/02/BHRC-Trial-Observation-Report-Kavala-28-January-2020.pdf

Contrast with the submissions made by Turkey at the UN Universal Periodic Review

171. On the same day as the hearing at Silivri on 28 January 2020, the UN Human Rights Council Working Group was in session at Geneva as part of the Universal Periodic Review of Turkey's observance of Human Rights. BHRC note that the proceedings at Silivri on that day were in marked and depressing contrast to Turkey's written submissions to the UN Human Rights Council as part of the review.

172. At paragraph 23 of its submissions to the UN[43], for instance, Turkey stated that the main pillars of its Judicial Reform Strategy are:

> "...strengthening the rule of law, protecting and promoting rights and freedoms more effectively, strengthening the independence of the judiciary and improving impartiality, increasing the transparency of the system, simplifying judicial processes, facilitating access to justice, strengthening the right of defense in criminal proceedings and protecting the right to be tried within reasonable time more effectively. (Recommendations 148.6, 7, 9, 30, 37, 107)".

173. BHRC note that the decision in the Gezi Park trial to hear a crucial witness in the absence of the defence, for instance, is inconsistent with the declared aim of facilitating access to justice and strengthening the right of defence in criminal proceedings.

174. Likewise, regarding the right to be tried within reasonable time, by its ruling on this case on 10 December, the ECHR held that Turkey had been in breach of the obligation under Article 5(4) to rule on the lawfulness of Osman Kavala's pre-trial detention within a reasonable time. For sixteen months after being placed in detention, Mr Kavala had been detained without having been charged. The EHCR observed in its ruling that that the extension of Mr Kavala's detention in this way could have a dissuasive effect on the non-governmental organisations whose activities were related to matters of public interest.

175. At paragraph 30 of its submissions, Turkey stated that:

[43] https://undocs.org/A/HRC/WG.6/35/TUR/1

> "Turkey continued its efforts to enhance compliance with the recommendations of international human rights mechanisms both in law and practice."

176. At paragraph 44 of Turkey's submissions it is stated:

> "Turkey continues to uphold its international obligations deriving from treaties and conventions it has ratified as well as customary international law..."

177. BHRC note that, in stark contrast to the submissions at 30 and 44 above, Turkey has repeatedly refused abide by its obligation to implement the ECHR decision of 10 December 2019 calling for Mr Kavala's *immediate* release.

178. At paragraph 81 concerning freedom of expression and the media, Turkey stated:

> "Freedom of expression and the media are safeguarded by the Constitution and other relevant legislation. There is an active and pluralistic media community enjoying international standards of freedom of expression and media in Turkey."

179. BHRC note that, according to statistics provided by the Committee for the Protection of Journalists, as of December 2018, Turkey had more journalists in prison than any other country. 2019 represented the first year in the last four that Turkey were not top of this list (now being second) of the countries with the most imprisoned journalists.[44]

180. Regarding the right to peaceful assembly and association, Turkey stated at paragraph 86:

> "Freedom of peaceful assembly and association is a democratic right safeguarded by the Constitution (Articles 33 and 34) and the relevant national legislation."

181. BHRC note that the ECHR decision of 10 December 2019, in relation to Article 18, established beyond reasonable doubt that the prosecution in the Gezi Park case was pursued an ulterior purpose, namely that of reducing the Mr Kavala to

[44] https://cpj.org/reports/2019/12/journalists-jailed-china-turkey-saudi-arabia-egypt.php

silence. Further, it considered that the measures were likely to have a dissuasive effect on the work of human-rights defenders. The EHCR noted that the matters that were relied upon in the indictment to support allegations of a serious crime were based upon lawful activity and enjoyment of Convention rights such as freedom of expression. The Gezi Park trial represented a full-frontal attack on rights of assembly and association.

182. Paragraphs 230-232 of the ECHR 'Kavala' judgement read as follows:

> "In the Court's opinion, the various points examined above, taken together with the speeches by the country's highest-ranking official (quoted above), could corroborate the applicant's argument that his initial and continued detention pursued an ulterior purpose, namely to reduce him to silence as a human-rights defender. Moreover, the fact that the prosecutor's office referred in the bill of indictment to the activities of NGOs and their financing by legal means, without however indicating in what way this was relevant to the accusations it was bringing, is also such as to support that assertion. The Court is also aware of the concerns expressed by the Commissioner for Human Rights and the third-party interveners, who consider that the applicant's detention is part of a wider campaign of repression of human-rights defenders in Turkey.
>
> Indeed, at the core of the applicant's Article 18 complaint is his alleged persecution, not as a private individual, but as a human-rights defender and NGO activist. As such, the restriction in question would have affected not merely the applicant alone, or human-rights defenders and NGO activists, but the very essence of democracy as a means of organising society, in which individual freedom may only be limited in the general interest, that is, in the name of a "higher freedom" referred to in the travaux préparatoires (see Navalny, cited above, §§ 51 and 174). The Court considers that the ulterior purpose thus defined would attain significant gravity, especially in the light of the particular role of human-rights defenders (see paragraph 74-75 above) and non-governmental organisations in a pluralist democracy…"

183. In its interim report following the hearing on 28 January 2020[45] BHRC called upon Turkey to make good on its submissions to the UN. In relation to the Gezi Park case, this involved:

- Reconsidering what appeared to be a meritless indictment and one held by ECHR to have been pursued for the ulterior motive of silencing human rights defenders.
- Immediately releasing Osman Kavala in accordance with its obligations to implement the decision of the ECHR.
- Reversing the decision to hear a key witness in the absence of the defence.
- Reversing the unedifying decision to add as a complainant a police officer convicted of unlawfully killing a Gezi protester.

184. The BHRC interim trial report concluded that:

> "This case and indeed Turkey's general observance of the rule of law are at a pivotal moment."

Final Opinion of the Prosecutor

185. On 6 February 2020,[46] the Istanbul chief public prosecutor's office presented its final sentencing opinion to the Court regarding the Gezi Park case. In this, the prosecutor requested aggravated life sentences for three of the Defendants; Osman Kavala, Yiğit Aksakoğlu and Ayse Mücella Yapıcı.

186. According to this opinion:

> "It has been understood that Gezi Insurrection did not occur randomly, but was conducted in a systematic and planned manner as part of an organization; it was turned into anti-government protests in time; though it was presented as an innocent protest for democratic rights, its main aim was to create an environment of chaos and disorder across the country by spreading acts of violence by means of various terrorist organizations,

[45] https://www.barhumanrights.org.uk/wp-content/uploads/2020/02/BHRC-Trial-Observation-Report-Kavala-28-January-2020.pdf

[46] https://www.duvarenglish.com/domestic/2020/02/06/prosecutor-seeks-life-sentences-for-three-gezi-park-defendants-in-final-legal-opinion/

thereby inciting the public to an armed rebellion and public revolt against the government of the Republic of Turkey."[47]

187. Prosecutor Edip Şahiner requested that six other defendants in the case (Çiğdem Mater Utku, Ali Hakan Altınay, Mine Özerden, Tayfun Kahraman, Can Atalay and Yiğit Ali Ekmekçi) be sentenced to 15-20 years in jail over charges of "aiding" the "organizers" of the Gezi Park protests.

188. The prosecutor also requested that the files of seven other Defendants in the case, who are abroad, be separated from the main case file (Can Dündar, Memet Ali Alabora, Ayşe Pınar Alabora, Gökçe Yılmaz, Handan Meltem Arıkan, Hanzade Hikmet Germiyanoğlu and İnanç Ekmekçi). The prosecutor, however, put these seven defendants on the same footing as the as the three alleged "organizers" of the protests; Osman Kavala, Yiğit Aksakoğlu and Ayse Mücella Yapıcı.

Hearing of 18 February 2020

189. Kevin Dent QC attended this hearing on behalf of BHRC.

190. At this hearing at the 30th Serious Criminal Court at Silivri near Istanbul, Osman Kavala and eight other defendants were acquitted of all Gezi Park charges as the Court ruled that there was no evidence in relation to allegations that they had plotted to overthrow the Turkish state by force and violence during the protests cantered around Istanbul in 2013.

191. The case remained open in respect of the defendants who are abroad; Can Dündar, Memet Ali Alabora, Ayşe Pınar Alabora, Gökçe Yılmaz, Handan Meltem Arıkan, Hanzade Hikmet Germiyanoğlu and İnanç Ekmekçi.

192. Although BHRC welcomed these verdicts, it noted that the damage that this case caused to confidence in the rule of law in Turkey was matched only by the harm it will have inflicted on the defendants, their families, supporters, civil society and human rights groups.

193. Various defendants have spent periods in detention in respect of a wholly meritless prosecution and, indeed, Osman Kavala had, by then, spent 930 days in custody, prolonged for 8 weeks without justification after the ECHR had ruled

[47] http://bianet.org/english/print/219763-who-is-charged-with-what-in-prosecutor-s-opinion-in-gezi-trial

that he should be released immediately. Likewise, co-defendant Yiğit Aksakoğlu had been detained for seven months following his arrest on 17 November 2018 until his release on bail on 25 June 2019.

194. Likewise, until the moment the verdicts were announced, the hearing on 18 February 2020 represented a cruel, degrading and pointless farce. Notwithstanding that the Court had almost certainly already decided to acquit the Defendants (the judges retired for ten minutes before pronouncing the verdicts) this was not communicated or indicated until the very last moment.

195. As a consequence, the defendants and their counsel were obliged to argue at the hearing in respect of a number of petitions seeking to extend the trial to allow for proper examination of the evidence, as there had been none to that point.

196. Moreover, the defendants were called upon to make their oral closing statements in the knowledge that they could be convicted of charges in which the prosecution were seeking sentences up to and including aggravated life imprisonment.

197. Further, the defence lawyers were prevented from making closing submissions, prompting protests by them. This led to extraordinary scenes where defence lawyers were surrounded by a phalanx of security staff and soldiers in an attempt to remove some of those who had been involved in remonstrating with the Court about the lawfulness of curtailing their right to make a closing speech.

198. Although there was initial jubilation in the full public gallery following the verdicts, for the reasons set out below, this was shortly lived.

The Court's written judgement

199. The Istanbul 30th Serious Criminal Court on 24 February released a written judgement setting out the reasoning for its verdicts of acquittals.

200. In relation to the allegation that Osman Kavala and/or groups associated with him had provided financial assistance to the Gezi Park protests, the judges indicated they had analysed the reports it had received from the Financial Crimes Investigation Bureau (MASAK) and had not found any evidence linking Osman Kavala to any monies provided to organise the protests.

201. The judges also stated that they did not take the wiretapped audio recordings of

Osman Kavala from 2013 into account as these, in its view, had been obtained illegally.

202. The Court said the testimony of Murat Pabuç had no substantial value in the proceedings. Mr Pabuç had said in his original testimony that he had been given gas masks that had been distributed from a restaurant associated to Osman Kavala.

203. The Court concluded that there was no concrete evidence in support of the charges in relation to each of the nine defendants.

Events following the acquittal

Announcement of appeal by the Public Prosecutor

204. Only a few hours after the verdicts of acquittal and before Osman Kavala had been released, however, there was an announcement by the Public Prosecutor's Office that it would seek to appeal against the acquittals. At the time of writing this report, no decision on appeal has yet been issued.

205. The 90-page written grounds of appeal were published on 8 April 2020 and included stated concerns, amongst other things, that Osman Kavala was "Giving priority to citizens of Kurdish and Armenian origin…". BHRC does not see, however, how such comments can be of any relevance to the issues in the Gezi Park proceedings.

206. As part of what appears to BHRC to be a decidedly *political* approach to the appeal, the Public Prosecutor stated:

> "It has been understood that Open Society Foundation that is the leading off-shoot of George Soros in Turkey, and the accused Osman Kavala, generated points of resistance in various segments of the society on the most innocent topics such as women's rights, child abuse, violence against women, assimilation of minorities, freedom of expression, environmental sensitivities. Hence, they have gathered people around projects on these topics and they have been able to provoke these individual communities against any administration on arguments that everybody has the same concerns, that the barrier before freedoms is the political power and that it should be changed. As such, it has been understood that they have tried to incapacitate all administrations they have seen as a hindrance before their goal through mass uprisings."

New warrant of detention for Osman Kavala

207. Further, the Public Prosecutor announced that a new detention warrant had been issued against Osman Kavala in respect of the attempted 2016 coup, thus in effect re-opening the criminal investigation against him in relation to allegations under Article 309 of the Turkish Penal Code, of attempting to overthrow the constitutional order through violence.

208. He was then re-arrested at the point of being released from prison and, at the time of writing, remains in detention.

Comments made by President Erdoğan following the acquittals

209. BHRC notes that the issuing of a new warrant of detention coincided with public comments about the acquittals made by President Recep Tayip Erdoğan who, on the day after the acquittals, was reported to have said[48]:

> "There are Soros-like people behind the scenes trying to stir up things by provoking revolts in some countries. The Turkey branch of this [Osman Kavala] was in prison, but they dared[49] to acquit him."
>
> "The developments yesterday once again made us recall the Gezi events. The events that started over sensitivities for trees and the environment turned into a resurgence against the state and the nation,"

210. President Erdoğan said the Gezi protests were no different from coup attempts or terrorist attacks, and said some people had directed young people during the demonstrations that swept the nation from a run-down park near Istanbul's Taksim Square, and resulted in the deaths of 21 people.

211. President Erdoğan was reported as saying "This event had nothing innocent in it" and that some people linked to the Gezi protests had tried to provoke an uprising like ones seen in other countries that he said had been supported by American-Hungarian financier George Soros.

212. Clearly referring to Osman Kavala and the Gezi Park trial Defendants, President Erdoğan was reported as saying "His (Soros) Turkish leg was also inside the country, but they tried to acquit him yesterday by a manoeuvre."

213. In BHRC's view, these comments are significant. ECHR noted in its ruling that various comments strongly condemning Osman Kavala and the Gezi Park protests had been made by, then Prime Minister, Erdoğan in the lead up to the issuing of the indictment. These renewed comments by President Erdoğan in

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[48] https://www.wsws.org/en/articles/2020/02/26/turk-f26.html and https://ahvalnews.com/gezi-trial/Erdoğan-slams-turkish-court-acquitting-gezi-activists

[49] By reference to the two online news reports above, there may be proper doubt as to whether the comment "dared to acquit" or rather "tried to acquit" was used.

the wake of the acquittals only add weight to ECHR's assessment that the prosecution was brought for ulterior political motives and in violation of Article 18. It is also worrying, to say the least, that the acquittals were condemned as a 'manoeuvre'. Such comments would also serve to put illegitimate pressure on both public prosecutors alike when dealing with such cases.

Investigation into the Gezi Park judges

214. Indeed, in a further worrying development, it was reported on 19 February 2020 that the Turkish Council of Judges and Prosecutors has initiated a disciplinary investigation concerning the panel of judges who acquitted Defendants in the Gezi Park trial.

215. This move was widely condemned internationally as a violation of the fundamental principal of judicial independence. [50]

216. The International Bar Association's Human Rights Institute Co-Chair, the Hon Michael Kirby AC CMG, commented:

> "We implore the Turkish Council of Judges and Prosecutors to reconsider the hugely damaging impact their inspection of the judges will have on the principles of judicial independence and the rights of lawyers, and to cease all action in this respect."

217. Massimo Frigo, Senior Legal Adviser for the International Commission of Jurists said:

> "The launch of such an investigation is a further sign of the collapse of the rule of law in Turkey… The disciplinary proceedings against these judges appear to be a direct interference in their decision-making power and will have a chilling effect on the independence of all members of the judiciary. The role of the CJP should be to protect the independence of the judiciary, not to be an instrument of control and pressure against individual judges."

218. The opening of a disciplinary investigation in respect of the Gezi Park judges led on 24 February 2020 to a joint statement on behalf of 25 Bar Associations within Turkey condemning the investigation and initiating a march in protest against

[50] https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=2dc38dbf-4b19-43b6-8988-a9772da0ea71

the move.[51] The joint declaration said that "Turkey was experiencing its most severe judiciary crisis of its history and that political intervention into the judiciary had come to an "unacceptable point." It stated the Council of Judges and Prosecutors had become "politicised" and turned into the political authorities' tool of oppression against independent judges."

219. It further said:

> "Turkish Republic is experiencing its most severe judiciary crisis of its history. Courts are disbanded following their decisions and investigations are launched into judges who hand down rulings before the ink of their signatures dries up, and the principle of judiciary independence is violated every day with a new example," it said.

220. In BHRC's view, both the comments referred to above by the President of Turkey and these disciplinary proceedings are contrary to the basic principles of judicial independence as set out at[52] in the UN Office of the High Commissioner's Basic Principles on the Independence of the Judiciary:

> "Independence of the judiciary
>
> 1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.
>
> 2. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason."

221. These disciplinary proceedings also come in the wake of the arrest, imprisonment and dismissal of large numbers of prosecutors and lawyers in the wake of the 2016 attempted coup. These all contribute to an environment where proper exercise of judicial independence is under huge strain.

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[51] https://www.duvarenglish.com/domestic/2020/02/25/turkish-bar-associations-to-march-for-independent-judiciary/

[52] https://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx

222. Instead, such measures have the effect of sending out a loud and clear message to those judges dealing with highly political cases not to act in a way which may displease the Government. As such, these moves are fundamentally incompatible with judicial independence, a cornerstone of the rule of law.

BHRC's response

223. BHRC, therefore, strongly condemns the response by the Turkish Authorities to the Gezi Park acquittals, the continued detention of Osman Kavala and the bringing of a disciplinary case against the Gezi Park judges.

224. BHRC strongly condemns any such interference in the impartiality of the judiciary and calls for any such investigation to be halted. The move against the judges is also likely to have an intimidatory effect on judges dealing with Osman Kavala's renewed case regarding the 2016 attempted coup.

225. BHRC also notes that:

- This bringing of a fresh warrant against Osman Kavala has extended the detention that he has already suffered in relation to charges found, by both the ECHR and the domestic trial Court, to be based on no concrete evidence;

- Given that the 'Gezi Park' proceedings had already been ruled by ECHR to be brought for the illegitimate purpose of silencing and deterring human-rights defenders in exercising their Convention rights, the new moves by the prosecution add to the strong appearance of political manipulation of legal processes.

- Indeed, such moves constitute a further violation of Article 18 in that, yet again, criminal proceedings are being brought for what appears to be political purposes.

- This action fits in with a deplorable pattern of behaviour that appears to be becoming prevalent, for example in the cases of Ahmet Altan and Selahattin Demirtaş, which BHRC has also been monitoring, in which authorities are choosing to instigate new or further proceedings in order to perpetuate harassment of individuals in the face of court rulings adverse to a preferred state position.

- Such pattern wholly undermines and contradicts Turkey's recent representations to the United Nations during the Universal Periodic Review that it was committed to strengthening prosecutorial independence and observation of the rule of law.

Initiation of new charges of espionage against Osman Kavala

226. Although on 18 February 2020, Osman Kavala had been re-arrested in respect of a re-opened investigation in respect of the failed coup attempt under Article 309 of the Turkish Criminal Code, it became apparent that this would be inadequate as a means of ensuring that Osman Kavala remained in detention.

227. There were three key reasons for this. Firstly, as indicated above, the ECHR had already ruled that Osman Kavala's detention in respect of the both the attempted coup in 2016 and the Gezi Park events had been a violation of his Convention rights and had called for his immediate release in respect of *both*. Continuation of his detention would, therefore be in direct defiance of the EHCR.

228. Secondly, Osman Kavala had already been released from detention in respect of the 2016 attempted coup, back in October 2019.

229. Thirdly, Osman Kavala had already spent the maximum two-year period in pre-charge detention in respect of that allegation, in accordance with the Judicial Reform Package of 2019.

230. It followed that, if the re-opening of the attempted coup investigation was any kind of manoeuvre to ensure Osman Kavala remained in detention, it would not be an effective one. Equally, although ECHR had called on 10 December 2019 for Osman Kavala to be released immediately, the 'back-stop' date for ratification of the ECHR decision by the Turkish Courts was calculated to be 10 March 2020.

231. Almost predictably, therefore, Osman Kavala was further arrested on 9 March 2020, this time in respect of new charge of espionage, of "securing information that, due to its nature, must be kept confidential for reasons relating to the security or domestic or foreign political interests of the State, for the purpose of the political or military espionage". The effect of the bringing of the new charge is, effectively, to re-start the clock so far as Osman Kavala's detention is concerned.

232. BHRC notes in respect of the new allegations that these appear to concern Osman Kavala's alleged contact with Henri Barkey, a professor of International Relations at Lehigh University and a former US Department of State official. Osman Kavala, however, was questioned by police about such conduct back in 2017 as part of the investigation into the attempted coup.

233. Indeed, the ECHR noted and evaluated the allegations regarding such contact extensively in its judgement as this was essentially the *same evidence* relied upon to support an allegation that Osman Kavala had been involved in the attempted coup of 2016[53] At paragraph 154 of its judgement, ECHR stated:

> "With regard to the accusations concerning the attempted coup of 15 July 2016, the Court observes that these were predominantly based on the existence of "intensive contacts" between the applicant and H.J.B., who, according to the Government, was the subject of a criminal investigation for participation in organising an attempted coup.
>
> In the Court's view, however, the evidence in the case file is insufficient to justify this suspicion. The prosecutor's office relied on the fact that the applicant maintained relationships with foreign nationals and that his mobile telephone and that of H.J.B. had emitted signals from the same base receiver station. It also appears from the case file that the applicant and H.J.B. met in a restaurant on 18 July 2016, that is, after the attempted coup, and that they greeted each other briefly.
>
> In the Court's opinion, it cannot be established on the basis of the file that the applicant and the individual in question had intensive contacts. Further, in the absence of other relevant and sufficient circumstances, the mere fact that the applicant had had contacts with a suspected person or with foreign nationals cannot be considered as sufficient evidence to satisfy an objective observer that he could have been involved in an attempt to overthrow the constitutional order."

234. Thus, in the view of BHRC there does not, on the face of it, appear to be anything new in the espionage allegations. Moreover, such evidence was found by the ECHR to provide no reasonable suspicion for the commission of an offence. [54]

[53] Kavala v Turkey ECHR 2019 (28749/18) at paragraphs 35, 36-38, 108, 117, 147 and 154.
[54] Kavala v Turkey ECHR 2019 (28749/18) at paragraph 154.

235. Further, the charges appear to relate to inferences from the *fact* of Osman Kavala's contact with Henri Barkey rather than from any recording of conversations. Bearing in mind that the Gezi Park trial was based, in part, on interception of telephone communications, it is surprising that any incriminating conversations (if such had existed) had not already been drawn to the attention of the courts.

236. In BHRC's view, the circumstances of the new arrest give rise to the overwhelming inference that, once again, proceedings are being instigated and detention perpetuated for political reasons. The new manoeuvres are highly likely, therefore, to represent a further violation of Article 18 of the Convention.

237. Indeed, this violation of Article 18 is strongly *aggravated* in that it appears a political manoeuvre in order to overcome the ECHR's ruling that the original proceedings were a political manoeuvre. It therefore represents the most blatant defiance of the ECHR. It is further aggravated in that Osman Kavala continues to be in detention and has now been for over 900 Days.

Continued detention in the wake of COVID-19

238. Turkey, like many other States, has been considering its responsibilities to the health of those in detention in the wake of the current COVID-19 outbreak. To this end, the Turkish Parliament passed legislation on 14 April 2020 to release certain categories of prisoners, seeking to prevent the spread of the virus across prisons and detention centres in Turkey by releasing prisoners on early parole, house arrest or other alternatives to detention.

239. BHRC notes, however, that the list of those to be paroled contains a blanket exclusion of political prisoners, including lawyers, judges, human rights defenders, journalists and academics, including Osman Kavala.

240. BHRC issued a statement of concern about these developments on 3 April 2020 [55] stating that, although it welcomes legislation to reduce prison overcrowding in the current public health pandemic, it expresses serious concerns about the following features of the (then) draft legislation:

[55] https://www.barhumanrights.org.uk/wp-content/uploads/2020/04/BHRC-Statement-on-Turkish-political-prisoners_3-April-2020.pdf

- The blanket exclusion of thousands of inmates convicted on terrorism charges, irrespective of their underlying health conditions or vulnerability to the COVID-19 infection;

- The failure to provide for measures for the release of detainees held in provisional or pre-trial detention – whose numbers are currently estimated to be 43,000.

241. In underlining the importance for those who have been detained without any proper legal basis, BHRC supports the interim guidance of the OHCHR and WHO which specifically calls for the release of those whose detention is arbitrary or otherwise does not comply with domestic or international standards, as well as the release of those who may be particularly vulnerable to the virus, including children, persons

242. In the statement, BHRC called on the Government of Turkey to uphold its obligations under international law and to ensure that political prisoners, including those in provisional and pre-trial detention are immediately released, and that the principle of non-discrimination is applied in the application of such measures. Moreover, the early release or suitable alternatives to detention should be prioritised at the earliest juncture for those who are facing specific risks through the infection or transmission of COVID-19.

243. At the time of writing, Osman Kavala and other prominent rights-defenders, remain in detention on the basis of these discriminatory measures which provide the strong impression that those judged to be political opponents of the Government of Turkey are deliberately and vindictively singled out for particularly harsh measures.

Conclusion and recommendations

244. In many ways, the events in Gezi Park described above speak for themselves and require little summation. BHRC shares the ECHR's assessment that these proceedings that were brought for political reasons and in order to silence and deter civil society groups and human rights activists, part of a worrying pattern of similar prosecutions. BHRC therefore concludes that they represent a breach of Article 18 of the Convention.

245. In respect of the pre-trial detention of Osman Kavala, BHRC shares the view of the ECHR that there have been breaches of Articles 5 § 1 and 5 § 4. Such breaches have since been aggravated by the refusal of the authorities to release him immediately following the ECHR ruling and through various manoeuvres since his acquittal to perpetuate his detention.

246. BHRC's concerns however, go further than the aspects ruled upon by the ECHR. Notwithstanding the acquittals, there were various aspect of the trial process that were incompatible with the defendants' rights to a fair trial under Article 6 of the Convention.

247. In respect to Article 6(3)(a), for instance, and the right to be informed promptly, in a language which a defendant understands and in detail, of the nature and cause of the accusation against him or her, BHRC has repeatedly commented on the lack of specificity in the Gezi Park indictment. Notwithstanding its 657 pages, it did not clearly set out the evidence in support of the charges, nor what evidence proved the defendants had taken part in an attempt to overthrow the government. Thus, there was a lack of specificity that, at some parts of the proceedings, appeared to leave defendants baffled as to what exactly they had been accused of and how they, or their lawyers, could meet the allegations.

248. In respect of the Article 6(3)(d) right to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his/her behalf under the same conditions as witnesses against him/her, BHRC has noted above concerns regarding the calling of a key witness, Murat Pabuç in the absence of the defence and any proper means to challenge his testimony.

249. BHRC also noted concerns above that defence counsel were prevented from making closing speeches and/or calling a number of defence witnesses. The verdicts of acquittal, however, do provide some indication that the Gezi Park

judges properly considered and evaluated the prosecution evidence in the light of submissions made by the defendants and their lawyers. Indeed, the verdicts of acquittal provide one of very few positive indications in what were otherwise deplorable proceedings.

250. Moreover, the basic thesis behind the Gezi Park indictment was the attempt to criminalise the association of the defendants between each themselves and others in the conduct of their ordinary lawful activity as civil society and human rights activists. There was a grand attempt to criminalise perfectly lawful association and so, in this light, the proceedings themselves represented a gross breach of the Article 11 rights of freedom of assembly and association. Indeed, it is evident from the ECHR ruling on Article 18, that it considered the purpose of the proceedings was to curtail the exercise of these rights.

251. Likewise, the prosecution sought to criminalise perfectly ordinary conversations between the defendants and others. Amongst the many conversations involving the defendants in the indictment, the ECHR found no material presented to it that supported any support for violence or a violent overthrow of the government. Indeed, the decision of the trial judges was to the effect that there was no evidence of any such support for violence. In that context, the proceedings themselves represented a full-frontal attack on the rights of freedom of expression under Article 10.

252. In the light of the Gezi Park proceedings, BHRC calls upon the authorities in Turkey to:

- Desist in bringing politically motivated arbitrary prosecutions, designed to punish, harass and curtail the work of civil society groups and human rights activists;

- Review and reform the process of drafting indictments so that they have the necessary element of specificity rather than presenting grand political theses;

- Release Osman Kavala immediately and end the unedifying manoeuvres being used to perpetuate his detention;

- Fully implement decisions of the ECHR in accordance with international obligations and put an end to manoeuvres aimed at defying them;

- Halt the disciplinary proceedings against the Gezi Park judges and support measures to improve judicial independence;

- Release from detention any prisoners whose health is likely to be affected by Coronavirus 19, regardless of whether they come within the ambit of being political detainees;

- Make good on the representations and promises made by Turkey in its submissions to the United Nations in the recent Universal Periodic Review.

253. The Gezi Park proceedings have served no legitimate purpose and have caused incalculable harm to both the defendants and the wider application of the rule of law in Turkey. Prosecutions like these have to stop.

Annexes

Annex 1: Joint statement of the Turkish Bar Associations

"If there is no defence, there is no fair trial!

Gezi; which is one of the most important political, social and democratic objection movements of our recent history, continues to be tried in Istanbul 30th High Criminal Court and the case is followed by us closely.

Our hopes that a "fair trial" will be carried out are fading, in the ongoing case that is based on an indictment prepared by "revaluation" of the FETO'ist (Fettullahist Terrorist Organisation) security forces, judges and prosecutors.

Previously, the principle of natural justice had been abandoned by hastily changing the panel of judges and the right to a fair trial was violated repeatedly by the practices of the changed panel.

This time, the panel went beyond the purpose of the provisions of the law and applied a unique practice and heard a witness; whose sanity is debated (as declared to the public by himself), while evading the defence attorneys (in absence of defence attorneys).

The Panel's hearing by approval of Murat Pabuç's claim that "he does not have life safety, despite the fact that two other witnesses have been heard in a high-security facility such as Silivri, is the clearest evidence that defence attorneys are seemed as one of the factors that may "threat the life safety".

This incomprehensible behaviour of the Panel means the intent of criminalization of the defence, exclusion of the defence from the trial and the elimination of the role of the defence attorneys in the judicial process. This is a direct attack to the defence.

The weakening of the attorneys in the judicial process, causing their failure to fulfil their duties; especially associating them with crime, damages public justice and violates the right to a fair trial.

This consequence destroys the trust of the citizens in justice and gradually makes the legitimacy of the court decisions controversial.

The unlimited reoccurrence in the Gezi Trial of the multi-faceted discrediting, devaluation and efforts of making the defence attorneys ineffective that have been going on for a long time against defence attorneys that perform their duty of defence, makes it necessary to re-evaluate.

Criminalizing the attorneys who are the biggest assurance of the right to a fair trial of the accused, against the desire to convict almost every form of opposition by associating it with crime and preventing the attorneys from duly performing of their duties, is also completely in a breach of "the equality of arms principle".

However, fair trial is the right of everyone. Tomorrow it will continue to be the right of everyone like today.

Against the occurrence of these practices, in Gezi Trial, we, the Bar Associations whose signatures follow below, emphasize that the right to a fair trial can only be fulfilled by independent courts as a result of effective usage of the defence right.

Otherwise; an arbitrary jurisdiction that its result is obvious beforehand and grounded on evidences provided by witnesses who have been heard hidden from defence attorneys, will never be fair. Defence cannot be associated with crime or identified with crime.

Because if there is no defence, there is no justice.

As the Bar Associations, as of the hearing will be held on January 28, 2020, we will carefully monitor the results of the trial, concerning the defence right. The expression on every platform of the violation of our rights guaranteed by national and international conventions is vital.

We present the trial to the attention and interest of the public and especially our colleagues.

Adana Bar Association Ankara Bar Association Antalya Bar Association Aydın Bar Association Bursa Bar Association Diyarbakır Bar Association Istanbul Bar Association İzmir Bar Association Mersin Bar Association Tunceli Bar Association Urfa Bar Association, Van Bar Association".

Presented to the Court on 28 January 2020.