The Gezi Park Case

A Trial Monitoring Report

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® The Gezi Park Case. A Trial Monitoring Report

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1. Introduction

In 2012 and 2013 a series of demonstrations took place at the Gezi Park in Istanbul to protest against the plan by the Istanbul Metropolitan Municipal Council (*Istanbul Büyükşehir Belediye Meclisi)* to pedestrianise Taksim Square in Istanbul with a project that would have re-zoned the Gezi Park, one of the few existing green spaces in the largest city of Europe.[1]

The demonstrations were promoted by several collective movements, made up of trade unions, political parties, professional associations and civil society organisations. The protests were initially peaceful. However, since the end of May 2013, reportedly following the harsh intervention by the police, demonstrations took place in many cities and towns all over Turkey, some of which involved violent incidents.

Between 2017 and 2019, more than four years after these events, at least sixteen human rights defenders were arrested and/or charged for "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. Those arrested include: Mehmet Osman Kavala, Gokçe Yilmaz, Ali Hakan Altinay, Hanzade Hikmet Germiyanoglu, Yigit Aksakoglu, Cigdem Mater Utku, Yigit Ali Ekmekci, Memet Ali Alabora, Handan Meltem Arikan, Can Dundar, Ayse Mucella, Serafettin Can Atalay, Tayfun Kahraman, Inanç Ekmekçi, Mine Ozerden, and Ayse Pinar Alabora.

Their trial began in Istanbul on 24 June 2019 before the 30th Assize Court (case file 2019/74, hereafter referred to as the "Gezi trial"). The International Commission of Jurists (ICJ) and the International Bar Association's Human Rights Institute (IBAHRI) monitored all hearings of this trial.

The organisations sent a team of international observers composed of Karinna Moskalenko, prominent Russian lawyer and ICJ Honorary Member; Justice Ketil Lund, former judge of the Supreme Court of Norway and ICJ Commissioner; Mark Ellis, Executive Director of the International Bar Association; and Phil Chambers, legal expert of IBAHRI.

The observers were provided with official *ordres de mission* presented in advance to the Court of Assize presiding over the trial, and reported directly to the secretariats of the ICJ and IBAHRI. In accordance with policy of the two organisations, the role of the aforementioned individuals was strictly to act as neutral observers of the legal process, and to assess compliance of the trial with international human rights law and rule of law principles to inform the present report. The methodology followed for the trial observation is contained in detail in the ICJ Trial Observation Manual for Criminal Proceedings.[2]

The ICJ and IBAHRI observers attended all hearings of the trial: on 24 and 25 June 2019, 18 and 19 July, 8 and 9 October, 18 October 2019, 24 and 25 December, and 20 January and 18 February 2020.

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[1] In 2013 several demonstrations took place to protest the decision of the demolition; when the demolition actually began on 27 May, about fifty environmental activists and local residents occupied the Park in an attempt to prevent its destruction. Following the violent evacuation of these protesters on 31 May 2013, different protests took place in several towns and cities in Turkey. See, statement of facts by the European Court of Human Rights in *Kavala v. Turkey*, ECtHR, Application no. 28749/18; Amnesty International, *Gezi Park Protests — Brutal Denial of the Right ot Peaceful Assembly in Turkey*, EUR 44/022/2013.

[2] ICJ, Trial Observation Manual for Criminal Proceedings, available at https://www.icj.org/criminal-trials-and-human-rights-a-manual-on-trial-observation/

2. General information and background

In recent years, Turkey has experienced a severe deterioration in the rule of law throughout the country. As reported by the ICJ, IBAHRI, and other independent civil society observers and experts, in the history of the Turkish Republic, the judiciary has often been subject to repeated attempts of control or undue influence by the different political powers of the day. Likewise, civil society has often been prone to harassment and persecution, including unwarranted criminal prosecutions.[3]

The failed attempt at a *coup d'état* and official response on 15 July 2016 left more than 251 people dead and more than 2,000 wounded. This led to the further destabilisation of many of the country's already weak institutions, leaving the rule of law severely damaged.

On 20 July 2016, Turkey declared a state of emergency, which entered into force the following day. Pursuant to this declaration, on 24 July Turkey proclaimed it was derogating from the European Convention on Human Rights, without specifying the specific provisions from which it was derogating. On 2 August it provided notification of derogation from the International Covenant on Civil and Political Rights with regard to: Article 2.3 (right to an effective remedy), Article 9 (right to liberty and security), Article 10 (right to humane treatment in detention), Article 12 (freedom of movement), Article 13 (procedural guarantees in expulsion proceedings), Article 14 (right to a fair trial), Article 17 (right to privacy), Article 19 (right to freedom of expression), Article 21 (right of peaceful assembly), Article 22 (freedom of association), Article 25 (political rights), Article 26 (equality before the law) and Article 27 (protection of minorities).

The state of emergency, in force between 21 July 2016 and 18 July 2018, allowed for the purging of the judiciary and for the widespread arbitrary arrest and trial of lawyers and civil society representatives on spurious charges of terrorism, offences against the State, insult to the nation or its President, and hate speech crimes. This significantly restricted the space for civil society to act to defend human rights in Turkey.

Specific measures adopted under the state of emergency included mass dismissal of public servants, judges and prosecutors, without an appropriate basis for dismissal and without ensuring due process guarantees.[4] During this period the judiciary was deprived of essential guarantees to ensure its independence. These measures have collectively impeded the capacity of the Turkish legal system to provide justice and any effective remedy for human rights violations.

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[3] See for more detailed information and references to the statements in this section, ICJ, *Turkey: the Judicial System in Peril*, 2016, available at https://www.icj.org/wp-content/uploads/2016/07/Turkey-Judiciary-in-Peril-Publications-Reports-Fact-Findings-Mission-Reports-2016-ENG.pdf; and ICJ, *Justice Suspended: Access to Justice and the State of Emergency in Turkey,* available at https://www.icj.org/wp-content/uploads/2018/12/Turkey-Access-to-justice-Publications-Reports-2018-ENG.pdf. See also, Commissioner for Human Rights of the Council of Europe, Report on visit to Turkey of 2019, available at https://www.coe.int/en/web/commissioner/-/turkish-authorities-must-restore-judicial-independence-and-stop-targeting-and-silencing-human-rights-defenders; OHCHR, Report on the impact of the state of emergency on human rights in Turkey, including an updated on the South-East, available at https://www.ohchr.org/Documents/Countries/TR/2018–03–19_Second_OHCHR_Turkey_Report.pdf; Communication to the Government of Turkey by the UN Special Rapporteur on the independence of judges and lawyers, https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=25533.

[4] Two members of the Constitutional Court; five members of the High Council of Judges and Prosecutors; 140 members of the Court of Cassation; 48 members of the Council of State; and 4,240 judges and prosecutors have been dismissed. 2,250 judges and prosecutors were arrested and some still remain in detention. See ICJ, *Justice Suspended, op. cit.*

3. Turkey's legal system and criminal justice system

Turkey is a civil law system governed under a constitution. International treaties, once ratified by the Grand National Assembly of Turkey, have the force of domestic law and "[i]n the case of a conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail".[5]

Turkey is a Member of the United Nations, the Council of Europe and the Organization for Security and Cooperation in Europe. It is party to: the European Convention on Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Elimination of All Forms of Discrimination against Women, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Rights of the Child, the International Convention for the Protection of the Rights of Migrant Workers and of the Members of their Families, and the Convention on the Rights of Persons with Disabilities. It has furthermore ratified the Optional Protocol to the UN Convention against Torture, the First and Second Optional Protocol to the International Covenant on Civil and Political Rights, the three Optional Protocols to the Convention on the Rights to the Child, the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, and the Optional Protocol to the Convention on the Rights of the Persons with Disabilities.[6]

The principle of the rule of law is enshrined in Article 2 of the Turkish Constitution which describes the State as "a democratic, secular and social state governed by the rule of law". In the Turkish legal system, the Constitution is the supreme law; laws cannot be enacted or applied in a manner contrary to it, and all executive, legislative and judicial organs, administrative authorities, institutions and individuals are bound by its provisions.[7]

Under Article 9 of the Constitution, judicial power is exercised by "independent and impartial courts on behalf of the Turkish nation". Within the civil judicial system, there are separate ordinary and administrative jurisdictions. The Constitutional Court has jurisdiction to review the constitutionality of laws and has the competence to adjudicate individual complaints. The Court of Cassation reviews the judgments of first instance civil and criminal courts; the Council of State reviews the decisions and judgments of all administrative courts; and the Court of Jurisdictional Disputes has jurisdiction to resolve disputes of jurisdiction among the high courts.

The independence of the Turkish courts is guaranteed in Article 138 of the Constitution:

- *Judges shall be independent in the discharge of their duties; they shall give judgment in accordance with the Constitution, laws, and their personal conviction conforming with the law.*
- *No organ, authority, office or individual may give orders or instructions to courts or judges relating to the exercise of judicial power, send them circulars, or make recommendations or suggestions…*[8]

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[5] Article 90, Constitution of Turkey (hereinafter the "Constitution"). Official translation by the Grand National Assembly of Turkey.

[6] See the ratification history of Turkey at https://treaties.un.org

[7] Article 11, *ibid.*

[8] Article 138, *ibid.*

Article 139 establishes the security of tenure of judges and public prosecutors. It stipulates:

- *Judges and public prosecutors shall not be dismissed, or unless they request, shall not be retired before the age prescribed by the Constitution; nor shall they be deprived of their salaries, allowances or other rights relating to their status, even as a result of the abolition of a court or a post. Exceptions indicated in law relating to those convicted for an offence requiring dismissal from the profession, those who are definitely established as unable to perform their duties because of ill health, or those determined as unsuitable to remain in the profession, are reserved.*[9]

Turkish prosecutors form part of the judicial system, although they have powers and functions distinct from those of judges.[10] The role of public prosecutors is particularly important during the pre-trial phase of criminal proceedings. They have the duty to investigate promptly after being informed about suspicions of a crime, and must gather and secure evidence both in favour of and against any suspects.[11] Throughout the investigation, the judicial police are under the command of public prosecutors.[12] If the public prosecutors believe that there is a reasonable basis for suspicion of a crime, they are obligated by law to file indictments.[13]

Under Turkish law, the work of lawyers is described as an independent public service.[14] In order to practice law, a lawyer must be registered with the bar association of the city where he or she resides. The bar associations, including the Union of Turkish Bar Associations at national level and the regional bar associations, are responsible for the admission of candidates to the profession, the regulation and the conduct of their traineeships, and disciplinary investigations. The Ministry of Justice retains a significant role in the admission of lawyers to the profession and in its disciplinary system. The admission decisions of the Union of Turkish Bar Associations are subject to the approval of the Ministry, which is also needed to launch criminal investigations and impose disciplinary measures against lawyers.[15]

The independence of the judiciary in Turkey was already subject to significant strains before the attempted coup of 15 July 2016 and the beginning of the state of emergency. These are described in the ICJ's briefing paper *Turkey: the Judicial System in Peril*.[16]

Nonetheless, the measures undertaken under the state of emergency, in particular the mass dismissals and arrests of judges, prosecutors and lawyers, have significantly weakened the justice system and its capacity to protect human rights and effectively remedy their violation.[17] [18]

The independence of the judiciary has been further imperilled following constitutional amendments approved by referendum on 16 April 2017 and which came into effect at different stages.[19] Amongst

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[9] Article 139, *ibid.*

[10] Articles 139 and 140, *ibid.*

[11] Article 160 of the Law on Criminal Procedure

[12] Article 161, *ibid.*

[13] Article 170, *ibid.*

[14] Article 1/1 of the Law on Practice of Law.

[15] Articles 8, 58 and 71, *ibid.*

[16] ICJ, *Turkey: the Judicial System in Peril,* 2 June 2016, available at https://www.icj.org/turkey-icj-raises-concerns-at-threats-to-the-independence-of-judges-prosecutors-and-lawyers/

[17] European Commission 2018 Report, *op. cit.,* p. 23.

[18] ICJ, 'Turkey: emergency measures have gravely damaged the rule of law', 6 December 2016, available at https://www.icj.org/turkey-emergency-measures-have-gravely-damaged-the-rule-of-law/

[19] Two provisions entered into force directly; one concerning the Judges and Prosecutors Board (is this the CJP?) and one permitting the President's membership of a political party. All other provisions entered into force following the electionsof 24 June 2018.

the reforms was a new process of appointment in respect of the Council of Judges and Prosecutors (CJP). The CJP is responsible for all decisions concerning appointment, career development, transfer and dismissal of judges and prosecutors. Under the new constitutional arrangements, of the thirteen Council members, six are now effectively appointed by the President of Turkey, including four ordinary members as well as the Minister of Justice (who acts as President of the Council) and the Under-Secretary of the Ministry of Justice. The remaining seven members are appointed by the National Assembly. None of the members of the Council is appointed by or with the participation of judges or public prosecutors.

Finally, under the new constitutional regime, the Turkish President is no longer required to appear non-partisan but rather may formally maintain a political party affiliation.[20] The result of these 'reforms' is that under the current constitutional framework the Council of Judges and Prosecutors cannot be considered structurally independent due to the significant degree of political control placed on the appointment of its members.[21]

There is therefore ample evidence that years of relentless interference by the executive and legislative branches over the judiciary and the erosion of its structural independence has engendered a judiciary that is receptive to even indirect directives of the central executive power, in particular of the President. While in respect of 'ordinary' cases with no political overtones this may go relatively unnoticed. Rather, it is in 'politically sensitive cases' that the independence of the judiciary is often tested.[22]

[20] For a description and assessment of the old system, please see ICJ, Justice in Peril, *op. cit*.

[21] Council of Europe Recommendation CM/Rec (2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, para. 27.

[22] See, ICJ, *Justice Suspended, op. cit.*

4. The Gezi Park case

The events at the origin of the Gezi Park trial occurred in 2012 and 2013, when a series of demonstrations took place to protest against the plan by the Istanbul Metropolitan Municipal Council (*Istanbul Büyükşehir Belediye Meclisi)* to pedestrianise Taksim Square with a project that would have destroyed the Gezi Park, one of the few existing green spots in the largest city of Europe. The demonstrations were promoted by several collective movements, including trade unions, political parties, professional associations and NGOs. The protests were initially entirely peaceful. At the end of May 2013, reportedly following the violent intervention by the police, a few and isolated violent incidents were recorded.[23]

According to information provided by the Turkish Government to the European Court of Human Rights, 3,611,208 persons took part in the "Gezi Park events". During these protests, 4,329 persons were wounded and four lost their lives. At the same time, 697 law enforcement officers were injured and two died. 5,513 persons were arrested.[24] The defendants in this case were not amongst those arrested in this period.

In contrast to the figures by the Turkish authorities, Amnesty International, citing figures of the Turkish Medical Association, reported more than 8,000 injured persons by 10 July 2013. It reported five people deceased and "strong evidence linking three of these deaths to the abusive use of force by police".[25] With regard to the arrests, Amnesty International, through statistics provided by the Ankara, Istanbul and Izmir Bar Associations, could document around 4,900 persons arrested of which 3,400 during the first weekend of protests (31 May — 2 June).[26] The Commissioner for Human Rights of the Council of Europe has reported that these events "were triggered as a result of the excessive use of force against a small number of peaceful protestors trying to stop the cutting of trees in Gezi Park".[27]

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[23] See, Statement of Facts in *Kavala v Turkey, op. cit.*

[24] *Ibid.*, para. 18.

[25] Amnesty International, *op. cit*., pp. 6 and 15.

[26] *Ibid.,* p. 41. See, statistics by the Turkish Medical Association at http://www.ttb.org.tr/images/stories/file/english.doc

[27] *Kavala v Turkey, op. cit.*, para. 21.

5. The initial charges and the investigation

In 2017, Osman Kavala was charged in connection with these events. Prior to that time, neither any charge nor even the existence of an investigation was known.

When Osman Kavala was detained on 18 October 2017, he was charged with both a violation of the Constitution (Article 309 of the Criminal Code) in connection with the 2016 coup attempt and charges of offences against the government (Article 312 of the Criminal Code) in connection with the Gezi Park protests. On 1 November 2017, an Istanbul prosecutor issued a warrant to keep Kavala detained during the investigation of both charges, which was upheld by a peace justice on the same day at the hearing in the presence of the defendant. Other suspects were briefly arrested in November 2018 and the investigation was extended. Of the other suspects, only Yiğit Aksakoğlu, Turkey representative of the Bernard van Leer Foundation, a Dutch philanthropic organisation focusing on early child development projects, was placed in pre-trial detention. Whilst Aksakoğlu was released at the first hearing on 24 June 2019, Osman Kavala continues to remain in detention.[29]

On 19 February 2019, the Istanbul public prosecutor filed an indictment in respect of the sixteen defendants for having attempted to overthrow the government by force and violence within the meaning of Article 312 of the Criminal Code. The persons charged were: Osman Kavala, Yiğit Aksakoğlu, Ayse Mücella Yapıcı, Çiğdem Mater Utku, Ali Hakan Altınay, Mine Özerden, Tayfun Kahraman, Can Atalay, Yiğit Ali Ekmekçi, Can Dündar, Memet Ali Alabora, Ayşe Pınar Alabora, Gökçe Yılmaz, Handan Meltem Arıkan, Hanzade Hikmet Germiyanoğlu and İnanç Ekmekçi.

On 11 October 2019, charges against Osman Kavala were dropped on the grounds that pre-trial detention is no longer a proportionate measure. Mr Kavala nonetheless remained in detention at Silivri Prison under the other charge under Article 312 of the Criminal Code (under which he was tried in the Gezi Park trial).[29]

During the investigation and trial, President Recep Tayyip Erdoğan made statements at a public event that openly hinted at the guilt of the suspects. He declared on 21 November 2018:

- *Did you ever think of that? Someone financed terrorists in the context of the Gezi events. This man is now behind bars. And who is behind him? The famous Hungarian Jew G.S. This is a man who encourages people to divide and to shatter nations. G.S. has huge amounts of money and he spends it in this way. His representative in Turkey is the man of whom I am speaking, who inherited wealth from his father and who then used his financial resources to destroy this country. It is this man who provides all manner of support for these acts of terror…*[30]

On 3 December 2018, he further affirmed in a press statement following the G20 Summit:

- *I have already disclosed the names of those behind Gezi. I said that its external pillar was G.S., and the national pillar was Kavala. Those who send money to Kavala are well known. And now they have taken the decision to close the foundation, to leave Turkey, and so on; this is how they have occupied our agenda.*[31]

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[29] The facts of the case can be found summarised in the statement by the European Court of Human Rights in *Kavala v Turkey* as well as in, *inter alia*, Human Rights Watch, *Turkey: Baseless Charges Over Landmark 2013 Protests*, available at https://www.hrw.org/news/2019/03/25/turkey-baseless-charges-over-landmark-2013-protests

[29] Human Rights Watch, *Turkey: Prominent Cıvic Leader Rearrested After Acquittal,* https://www.hrw.org/news/2020/02/20/turkey-prominent-civic-leader-rearrested-after-acquittal

[30] *Kavala v Turkey, op. cit.,* para. 61.

[31] *Ibid*.

6. The indictment

a) The contested facts

The defendants in the case were: Mehmet Osman Kavala, Gokçe Yilmaz, Ali Hakan Altinay, Hanzade Hikmet Germayanoglu, Yigit Aksakoglu, Cigdem Mater Utku, Yigit Ali Ekmekci, Memet Ali Alabora, Handan Meltem Arikan, Can Dundar, Ayse Mucella, Serafettin Can Atalay, Tayfun Kahraman, Inanç Ekmekçi, Mine Ozerden, and Ayse Pinar Alabora.[32]

The case for the prosecution, as contained in the indictment filed by the Istanbul Public Prosecutor issued on 19 February 2019, develops the theory that the Gezi Park protests were convened and turned into nationwide demonstrations with the purpose of overthrowing and provoking the government, drawing a parallel with popular movements such as the Arab Spring and Occupy Wall Street.

The indictment argues that after the Istanbul Metropolitan Municipality accepted a project on the pedestrianisation of Taksim Square, the defendants created a Facebook page "Rise Occupy Istanbul" and some gave interviews to the press stating they wished to see the Arab Spring movement extend to Turkey. The defendants were accused of having established a "Taksim Solidarity Platform" gathering trade unions, associations, political parties, and environmental organisations.

According to the prosecutor's case, the defendants used techniques of mass protest occupation, as promoted by groups OTPOR and CANVAS created by a Serbian Ivan Marovic. It is alleged that Ivan Marovic was present in Turkey between 18 June and 21 June 2012 and that some of the accused met him in that period.

The indictment explains that some of the accused allegedly wrote a theatre play in which they depicted an alternative reality of Turkey and the protests. The accused equally were deemed to have organised a festival called "Occupy". They allegedly started protesting on 7 May 2013, after some trees had been removed from the park; used slogans such as "this is just the beginning", "Taksim is ours, will remain ours", "Police piss of from the Park, Government resign, Tayyip resign"; and called the public to attend and conduct 'illegal' meetings in public spaces.

The indictment asserts that Anadolu Kultur, a foundation promoting culture and art, and the Open Society Association financially supported Gezi Park protests, and that Osman Kavala and others established various organisations and working groups and arranged meetings, panels, and summer camps. They were also alleged to have financially supported the protesters, opened a bank account for supplying materials to be used by protesters for clashes against the police, met with various foreign diplomats and ultimately organised the Gezi protests.

From the beginning of the operations of removal of the trees from the Park on 27 May 2013, it is alleged that the accused persons tried to reach their 'goals' with violent acts resulting in 746 protests in 78 cities, damaging various private and police properties, political parties' offices, public signs and bus stops, and resulting in the loss of life of five persons, including a police officer. The defendants are alleged to have led the public in accordance with their pre-established own 'agenda', and by so doing to have committed acts which aimed to leave government in a difficult political position and force its resignation.

After a careful reading of the indictment, it was impossible to find therein any video footage or photographs showing any of the suspects attacking the police or damaging property. These materials

[32] For more information, please see Human Rights Watch, *Turkey: Baseless Charges Over Landmark 2013 Protests*, 2019, https://www.hrw.org/news/2019/03/25/turkey-baseless-charges-over-landmark-2013-protests

only showed that some of the accused were present at the protests and rallies. In the list of every item of damage caused by the protesters in Istanbul and all over Turkey, none of the accused is identified. The line of reasoning is that the protests were the direct result of the Gezi Park demonstrations and, therefore, the 'organisers' of the protests were responsible for all of their consequences.

The indictment adduces the following types of evidence: tapped phone conversations; phone texts; physical surveillance; bank excerpts; witness statements; and Internet open source research. The surveillance evidence ascertains the existence of meetings, but not their content. Banking extracts (mainly donations to the Anadolu Foundation) demonstrate the existence of transactions but not their purpose or use.

The defendants have rejected all accusations. Independent narratives of the Gezi Park events and the ensuing protests, as well as of the police reactions and the Gezi Park trial, have been provided by Amnesty International and Human Rights Watch, as well as by the Commissioner for Human Rights of the Council of Europe.[33]

b) The charges

The indictment sets out the factual and 'evidentiary' basis for the indictment in some 638 pages. The legal considerations are then presented in just two pages.

All defendants are charged with "offences against the Government" under Article 312 of the Criminal Code (Law no. 5237), with the inclusion of the character of terrorist offence, i.e. with terrorist motives, falling under the list of "terrorism offences" of Anti-Terrorism Law no. 3713. The definition of terrorism under Article 1 of this law encompasses acts by one or more persons belonging to an organisation with the "aim of changing the characteristics of the Republic" or "weakening or destroying or seizing authority of the State" by means of "pressure, force and violence, terror intimidation, oppression or threat".[34]

Violation of the Constitution
Article 309 Criminal Code

(1) Any person who attempts to abolish, replace or prevent the implementation of, through force and violence, the constitutional order of the republic of Turkey shall be sentenced to a penalty of aggravated life imprisonment.

(2) Where any other offences are committed during the commission of this offence, an additional penalty for such offences shall be imposed according to the relevant provisions.

Offences against the Government
Article 312 Criminal Code

(1) Any person attempting, by the use of force and violence, to abolish the government of the Republic of Turkey or to prevent it, in part or in full, from fulfilling its duties, shall be sentenced to a penalty of aggravated life imprisonment.

(2) Where any other offence is committed during the commission of this offence, an additional penalty shall be imposed according to the relevant provisions.

[33] Commissioner for Human Rights of the Council of Europe, Report on visit to Turkey of 2019, available at https://www.coe.int/en/web/commissioner/-/turkish-authorities-must-restore-judicial-independence-and-stop-targeting-and-silencing-human-rights-defenders; Amnesty international, Gezi Park Protests: Brutal Denial of the Rights to Peaceful Assembly in Turkey, https://www.amnesty.org/download/Documents/12000/eur440222013en.pdf; Human Rights Watch, *op. cit*.

[34] Article 1 of Anti-Terrorism Law no. 3713.

Law on Fight Against Terrorism no 3713

Terrorist offences
Article 3

Offences defined under articles 302, 307, 309, 311, 312, 313, 314, 315, 320, and paragraph 1 of art. 310 of the Turkish Penal Code dated 26 September 2004, Act Nr. 5237, are terrorist offences.

As highlighted by six Special Procedure mandate holders of the UN Human Rights Council this definition "could entail that a range of speech and association activities protected under international human rights law is characterized domestically as 'terrorism'. Such a characterization would permit the arrest and detention of individuals exercising their internationally protected rights, restrictions which would constitute arbitrary deprivations of liberty under international law".[35] The mandate holders included the UN Special Rapporteur on the Promotion and Protection of Human Rights While Countering Terrorism, the Working Group on Arbitrary Detention; the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression; the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association; the Special Rapporteur on the Situation of Human Rights Defenders; and the Special Rapporteur on the Independence of Judges and Lawyers.

To establish the crime, force and violence must be used to hinder the government from fulfilling its constitutional duties. It is clear that the wording of the law requires physical force or violence. The *mens rea* required for the crime is intent; not only to commit the violent act but also to do so with the specific intent to abolish the government or to prevent it from fulfilling its duties.[36]

c) Applicable criminal procedural law

Osman Kavala was arrested under Article 100.3.a).12 of the Criminal Procedure Code (Law no 5271). This article affirms that a person in Turkey may be arrested where "strong grounds for suspicion are present, that the below mentioned crimes have been committed… Offences against the Constitutional Order and its Functioning" (Articles 309, 310, 311, 312, 313, 314, 315 of the Criminal Code).

With regard to investigative measures, the wiretapping and other forms of surveillance of the investigation were purportedly authorised under Article 135 of the Criminal Procedure Code that applied to "Offences against the Constitutional Order and its Functioning (Articles 309, 311,312, 313, 314, 315, 316)" (paragraph 8.a.15). However, sub-paragraph 15 of Article 135(8)(a) of the Criminal Procedure Law was amended on 2 December 2014, and this change introduced the above-mentioned crimes (Articles 309, 311, 312, 313, 314, 315, 316) within the scope of the measure of detection, monitoring and recording of communications. Crimes falling under those articles were therefore not contemplated as offences for which wiretapping was allowed at the time of the Gezi events.

[35] Communication by the Mandates of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism; the Working Group on Arbitrary Detention; the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression; the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association; the Special Rapporteur on the Situation of Human rights defenders; and the Special Rapporteur on the Independence of Judges and Lawyers to the Government of Turkey, OL TUR 13/2020 https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=25482

[36] Court of Cassation's Penal Division (16th Criminal Chamber, substance no 2016/6690, judgment no 2018/604).

7. The judgment of the European Court of Human Rights on Kavala's detention

On 10 December 2019, the European Court of Human Rights held that the detention of Osman Kavala, in connection with his role in the Gezi Park protests of 2013, violated his right to liberty (Article 5.1 ECHR) and the right to a speedy judicial review of detention (Article 5.4 ECHR) under the European Convention on Human Rights (ECHR).[37] The Court also found that his detention involved a restriction on rights for an improper purpose (Article 18 ECHR).[38]

In relation to the trial, it is important to note that the Court did find that the pre-trial detention on remand of Osman Kavala was unlawful under the right to liberty because there were no reasonable grounds for its order and maintenance.[39] The Court concluded that:

- *the authorities are unable to demonstrate that the applicant's initial and continued pre-trial detention were justified by reasonable suspicions based on an objective assessment of the acts in question. It further notes that the measures were essentially based not only on facts that cannot be reasonably considered as behaviour criminalised under domestic law, but also on facts which were largely related to the exercise of Convention rights. The very fact that such acts were included in the bill of indictment as the constituent elements of an offence in itself diminishes the reasonableness of the suspicions in question*.[40]

The Court could not:

- *overlook the fact that [Osman Kavala] was arrested four years after the Gezi events and the opening of the criminal investigation in 2013 [and the] Government has failed to submit any argument explaining this considerable lapse of time between the circumstances giving rise to the suspicions and the applicant's placement in detention*.[41]

The Court found the same shortcomings in the indictment and the charges therein.

It is particularly telling that the Court found a violation of Article 18 ECHR in connection with Article 5 of the European Convention on Human Rights. The finding of such violation by the Strasbourg Court is extremely rare and means that the ordinarily legitimate grounds to detain someone, in this case for criminal prosecution purposes, had been perverted and abused for reasons that are not accepted within the meaning of the Convention.

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[37] Article 5.1 ECHR: "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (a) the lawful detention of a person after conviction by a competent court; (b) the lawful arrest or detention of a person for noncompliance with the lawful order of a court or in order to secure the fulfilment of any obligation 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; (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority; (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants; (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition". Article 5.4 ECHR: "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".

[38] Article 18 ECHR: "The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed".

[39] Article 5.1 ECHR.

[40] *Kavala v. Turkey*, ECtHR, *op. cit.,* para. 157.

[41] *Ibid.*, para. 153.

Specifically, the European Court of Human Rights ruled that it was:

- *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 applicant to silence. Further, in view of the charges that were brought against the applicant, it considers that the contested measures were likely to have a dissuasive effect on the work of human-rights defenders. In consequence, it concludes that the restriction of the applicant's liberty was 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*.[42]

As a consequence of these findings, the Court specifically held that "the government must take every measure to put an end to the applicant's detention and to secure his immediate release".[43] The ICJ and IBAHRI called for his release on 10 December 2019.

[42] *Ibid.*, para. 223.

[43] See: IBAHRI and ICJ urge Turkey's Council of Judges and Prosecutors to cease probe into Gezi Park trial judges, 28 February 2020, available at https://www.ibanet.org/Article/NewDetail.aspx?_ArticleUid=2dc38dbf-4b19–43b6–8988-a9772da0ea71

8. The Trial

The trial, attended by the ICJ and IBAHRI observer team, took place before the Istanbul 30th Assize Court from 24 June 2019 to 18 February 2020. Assize Courts in the Turkish justice system are first instance courts competent to consider cases where serious criminal offences are contested. Five of the defendants were residing outside of Turkey and were therefore not present. Their cases were therefore severed from the main trial, following the provisions of Article 10 read together with Article 247.3 Code of Criminal Procedure

The composition of the judges serving on the judicial panel varied from hearing to hearing. The first two hearings were dedicated to opening statements by the prosecution and the defence, while the remainder of the hearings concerned the interrogation of defendants and witnesses.

The trial observers were never impeded in their access to the courtroom or in any other way. The hearings, with the exception of that held on 24 December 2019 (which fell on the date of the Christmas Eve holiday in many countries), were attended by international observers from European countries and international and national civil society organisations. Approximately 300 members of the public attended each session of the trial.

The observers noted that the trial room set the place for the prosecutors at a level that was physically more elevated and closer to the judges than the defence teams and at the same level as the trial judges. While this setting occurs in other civil law countries and has not been so far held by the European Court of Human Rights or other international human rights mechanisms to be incompatible with right to a fair trial under Article 6 ECHR, the observers noted that it gave an impression of inequality between the prosecution and defence to those present in the room.

The defendants were unable to sit with their lawyers, creating difficulty for lawyer-client communication during the hearing. This is the usual situation in Turkish courts.

Since the first hearing, the trial observers could not fail to notice that the judges and the public prosecution appeared to pay scant attention to the presentations by the defence lawyers and the defendants. At the first hearing, the observers noted that no judge took any notes during the proceedings.

The defendants and their lawyers built their case on the irrelevance of the charges and the indictment, on the continued detention of some and violations of the freedoms of assembly, expression and association.

The Court refused to accept testimonies via video-link for those defendants abroad after the prosecutor opposed these requests by the defendants' lawyers. No other grounds were given. Conversely, however, one prosecution witness was permitted to testify by video-link on 8 October. The connection was poor and did not allow those present to understand the testimony properly. The witness, a chief constable during the Gezi events, subsequently gave his testimony in person at the following hearing on 24 December, together with that of another witness. These witnesses gave a general picture of the demonstrations and elements that could be linked to violent acts such as the presence of Molotov cocktails, but could provide no testimony of any concrete actions by any of the accused.

At each hearing of the trial, Osman Kavala's detention was upheld. After the release of Yiğit Aksakoğlu at the first hearing on 24 June, Kavala remained the only defendant held on remand. This in spite of defence counsel's repeated petition for Mr Kavala's release, including at the 24 December 2019 and 20 January 2020 hearings that took place after the European Court of Human Rights had ruled his detention unlawful.

At the last hearing before the verdict, on 28 January 2020, the prosecution produced a previously unannounced witness via video-link. The witness was not allowed to appear on screen and the defence was not allowed to counter-examine him. His testimony was taken in a closed hearing that the defendants and their lawyers could not attend; ostensibly to protect the witness against unspecified 'threats' to him. To the ICJ/IBAHRI observer, he seemed unreliable. The witness was said to have given two statements to police, on 25 December 2019 and on 28 January 2020, about having found a gas mask. The defence contested the legitimacy of the witness, but the Court rejected its motion. This led to several protests from the public present in the courtroom that were quashed by the Court President through the removal of the public and of an opposition MP from the courtroom, despite the fact that the latter was legally entitled to remain.

9. The verdict

On 18 February 2020, the Court of Assize unexpectedly delivered a verdict of acquittal of all the defendants present in Turkey on the main charge under Article 312 of the Criminal Code.

The Court found that it was evident to the trial judges that "marginal groups and illegal leftist organisations" had infiltrated the general public in an organised and planned manner, disguising themselves as such and committing grave acts in order to create chaos within the country, to present State authority as weak, and to disturb public order.

The Court excluded evidence obtained through wiretapping and other forms of surveillance for lack of legal basis. The prosecution had decided to request these investigative measures under Articles 135 and 140 of the Code of Criminal Procedure without considering that, at the date of the events and of the request, "offences against the government" was not a category of crimes listed under Articles 135 and 138 of the CPC. Thus, given the established jurisprudence of the Court of Cassation and the principle of "fruit of the poisonous tree", the interceptions had been unlawfully obtained that could not be admitted.

Furthermore, the Court considered that Mucella Yapici had already been acquitted by Istanbul 33rd Criminal Court of First Instance of the charge of establishing a criminal organisation with the aim to commit criminal activities, under Article 220 of the Criminal Code, for the same facts.[44] That Court stated that the actions were within the scope of the freedoms of assembly and association as granted by the Constitution, and that there was no evidence establishing that the Taksim Solidarity Platform was a criminal organisation.

The Court noted that the contested facts of people assembling before the Prime Minister's Office in Istanbul and allegedly attacking law enforcement officers had already been tried by the Istanbul 33th Assize Court. Those accused were acquitted of various charges, including acts under Article 312 of the Criminal Code; the same as those contested in this trial.

With respect to various witness statements attesting to crimes allegedly committed by Osman Kavala, the Court considered that a first witness had not provided reliable statements and only testified to have allegedly found a gas mask used by Kavala during the protests. Another two witnesses had stated that they had no information concerning nor had witnessed the acts attributed to Kavala, and that they first saw him in Court.

With regard to allegations that Mr Kavala financed the Gezi Park incidents, a report by the Financial Crimes Investigation Board (MASAK) under the Ministry of Treasury and Finance presented at the trial showed no concrete evidence that the Open Society Foundation or the Anadolu Kultur had involvement. The Court found that the indictment did not explicitly describe to whom and in which manner financial transfers were executed before and after the Gezi incidents, nor did it contain any information establishing that these foundations were connected with any criminal or terrorist organisation. The allegations that Osman Kavala financed the individuals taking part in the Gezi events were therefore considered to be ill founded.

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[44] Ayse Mucella Yapici and four others had been charged with "Forming organised groups with the intention of committing crime" under Article 220 of Turkish Criminal Code, and with violating the Law 2911 on Assemblies and Demonstrations. The acquittal was delivered by Istanbul 33th Criminal Court of First Instance (no 2014/88, judgment no 2015/145). The judgment was finalised without appeal on 1 June 2015.

Finally, the Court affirmed there was no clear, concrete or lawful evidence sufficient to establish the guilt of the defendants present in Turkey with regard to the accusation of leading, directing or instigating marginal and illegal leftist groups to hinder the Government's functional capacities. The Court held, however, that there was a strong suspicion that the defendants had invited the public to demonstrations in a manner that violated Law number 2911 on Assemblies and Demonstrations. It further held that the defendants conducted these assemblies in violation of the law, threatened law enforcement while they were performing their duties, and resisted dispersal despite the warnings and use of force by the law enforcement authorities.

Following this reasoning, the Court of Assize acquitted under Article 312 of the Criminal Code Ayşe Mücella Yapici, Tayfun Kahraman, Şerafettin Can Atalay, Mine Özerden, Osman Kavala, Ali Hakan Altinay, Yiğit Aksakoglu, Yiğit Ali Ekmekci and Çiğdem Mater Utku, and ordered the immediate release of Osman Kavala.

The Court, however, also filed a criminal complaint to the Prosecutor against the accused who were members of Taksim Platform (Ayşe Mücella Yapici, Tayfun Kahmraman, Şerafettin Can Atalay, Mine Özerden). The complaint alleged that these individuals had organised demonstrations and public meetings in violation of Law number 2911 on Assemblies and Demonstrations, hindered law enforcement officials from their duties, and did not end these activities despite clear warnings. Osman Kavala, Ali Hakan Altinay, Yiğit Aksakoglu, Yiğit Ali Ekmekci and Çiğdem Mater Utku were accused of having participated in these alleged offences. The Court did not order the detention of the defendants under these charges.

The cases of those abroad at the time of the trial (Ayşe Pınar Alabora, Memet Ali Alabora, Hanzade Hikmet Germiyanoglu, Handan Meltem Arikan and Gökçe Tuyluoglu) were separated from those present in Turkey, as they could not be tried due to their absence from the hearings. The acquittal therefore did not extend to them. The Court held that their public statements and calls to civil society still provided some strong suspicion that they had manipulated civil society to pressure the government such that its members would resign.

10. After the trial

a) The defendants

Some hours after the acquittal, the Chief Prosecutor of Istanbul demanded the re-arrest of Osman Kavala based on another investigation on the attempted coup of July 2016; he was re-detained on 19 February 2020. This was the very same investigation relating to coup attempt in regard to which Kavala had been released from pre-trial detention on 11 October 2019.

On 9 March 2020, the Prosecutor brought a new charge against Kavala: the commission of espionage for the United States by allegedly sharing confidential government information with a United States national.[45] The charge was confirmed by Istanbul 10th Judgeship of the Peace that day. However, this detention order relied on the same facts that had already been reviewed by the European Court of Human Rights and found insufficient to justify his detention, focusing on his alleged contacts with a person suspected by the Government to be behind the coup and offering no specific new facts and no reference to a different investigation file.[46] This new charge reset the clock on Kavala's detention period.

b) The judges

The day after the acquittal of eight of the defendants, President Erdoğan, at a Party meeting, commented:

- *Look, it is not a simple incident of uprising. There are those types stirring up trouble to provoke some countries behind the scenes, as Soros does. And you know that its Turkey branch was behind bars. They attempted to acquit him with a manoeuvre yesterday.*
- *We of course have respect for every verdict of the law, but the judgement of our nation as well as that of ourselves about Gezi and the ones who stood in its way will never change.*
- *Our nation should be relieved; we will resolutely follow this issue to the end and will keep up the struggle to out last breath to ensure that justice is served.*[47]

Shortly thereafter, the judges who issued the verdict in the Gezi trial (Galip Mehmet Perk, Talip Ergen and Ahmet Tarık Çiftçioğlu) were subject to disciplinary proceedings by the Council of Judges and Prosecutors. The ICJ and IBAHRI called on the Council of Judges and Prosecutors to immediately stop these proceedings that constituted a "further sign of the grave decline of the rule of law in Turkey" and appeared 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".[48] Thirty Turkish Bar Associations issued a statement calling for the resignation of the members of the Council of Judges and Prosecutors and considered this investigation as a violation of the principle of judicial independence under the Turkish Constitution.[49]

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[45] Article 328 of the Criminal Code prohibits the securing information, for purposes of political or military espionage, that should be kept confidential for reasons relating to the security or domestic or foreign policy interests of the State.

[46] See, ECtHR, *Kavala v Turkey, op. cit.,* paras. 154 and 155.

[47] Bianet, "President Erdogan on Gezi Trial: They Attempt to Acquit Him with a Manouvre", available at http://bianet.org/english/politics/220275-president-erdogan-on-gezi-trial-they-attempt-to-acquit-him-with-a-maneuver

[48] Turkey: ICJ and IBAHRI urge Turkey's Council of Judges and Prosecutors to cease probe into Gezi Park trial judges, available at https://www.icj.org/turkey-icj-and-ibahri-urge-turkeys-council-of-judges-and-prosecutors-to-cease-probe-into-gezi-park-trial-judges/

[49] Bianet, "30 Bar Associations call for HSK Members' Resignation, available at http://bianet.org/english/law/220409–30-bar-associations-call-for-hsk-members-resignation

11. International law and standards

There are number of international human law and standards engaged in the Gezi Park trial. These include fundamental freedoms, such as freedoms of assembly, expression, association and political participation, the exercise of which many of the detainees engaged in Gezi Park. While it is beyond the scope of this report to assess whether there may have been lawful limitations placed on the exercise of these rights, they become more relevant to understand whether the prosecution has *de facto* prevented and punished the exercise of those rights.

The right to liberty, including under Article 9 of the International Covenant on Civil and Political Rights (ICCPR), is engaged in evaluating whether the detention of Kavala and his co-defendants has been and continues to remain lawful. With respect to the trial itself, the right to a fair trial contains a number of specific guarantees enshrined in Article 14 ICCPR and Article 6 ECHR. Both of those articles should be read together with the respective jurisprudence and commentary of the supervisory authorities for the ICCPR (the UN Human Rights Committee, including General Comment 32) and the ECHR (case law of the European Court of Human Rights).[50] In accordance with the principle of legality and the rule of law, "the fundamental requirements of fair trial must be respected during a state of emergency," and accordingly are not subject to derogation.[51]

a) Independence and autonomy of courts and prosecutors

A criminal trial, in order to be fair, must take place before "a competent, independent and impartial tribunal established by law".[52] These requirements are absolute, without exception or limitation.[53] The independence of the courts and judicial officers must be guaranteed by the Constitution, laws and policies of the State and respected in practice by the government, its authorities and agents, as well by the legislature. Indeed, "[a]ll branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level — national, regional or local — are in a position to engage the responsibility of the State" with respect to fair trial rights.[54]

A situation where the functions of the judiciary and executive are not clearly distinguishable or where the executive is able to control or direct the judiciary is incompatible with the principle of an independent and impartial tribunal.[55] Tribunals must also be effectively independent in practice and free from influence or pressure from the other branches of the State or from any other quarter.[56]

International law also requires courts to be impartial, meaning that tribunals, courts and judges must decide matters before them on the basis of the facts and in compliance with the law. This must occur without restriction nor improper influence, inducement, pressure, threat or interference, direct or indirect, from any quarter or for any reason.

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[50] Human Rights Committee, *General Comment no. 32,* UN Doc. CCPR/C/GC/32. A summary of the European Court jurisprudence on Article 6 ECHR can be found here https://www.echr.coe.int/Documents/Guide_Art_6_criminal_ENG.pdf

[51] Human Rights Committee, *General Comment no. 29,* UN Doc. CCPR/C/21/Rev.1/Add.11, para. 16.

[52] Articles 14.1 ICCPR and 6.1 ECHR.

[53] Human Rights Committee, *General Comment No. 32*, *op. cit.*, paras. 18 and 19.

[54] Human Rights Committee, *General Comment No. 32*, UN Doc. CCPR/C/21/Rev.1/Add.13, para 4.

[55] Human Rights Committee, Views of 20 October 1993, *Angel N. Oló Bahamonde v. Equatorial Guinea,* Communication No. 468/1991, para. 9.4.

[56] See the UN *Basic Principles on the Independence of the Judiciary*, Principles 1, 2, 3 and 4.

In a criminal trial, the role of the prosecution and its respect of international standards is of paramount importance.[57] The proper exercise of prosecutorial functions requires autonomy from the other branches of the State. Prosecutors, even if administratively part of the executive, should remain functionally independent thereof. In all cases, States have a duty to provide safeguards so that prosecutors can conduct investigations impartially and objectively without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability.[58]

The UN Guidelines on the Role of Prosecutors provide that "[p]rosecutors shall, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system".[59]

In the performance of their duties, prosecutors should protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim, and pay attention to all relevant circumstances irrespective of whether they are to the advantage or disadvantage of the suspect.[60] Prosecutors should not initiate or continue prosecution, or should make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded.[61]

b) Rights and guarantees in the trial

In all criminal trials, everyone has "the right to be presumed innocent until proved guilty according to law".[62] This right is not subject to limitation or derogation at any time, not even in times of war or other state of emergency.[63] All public authorities and officials must respect the presumption of innocence and therefore have a duty to refrain from prejudging the outcome of a trial. For example, they must refrain from making public statements affirming the guilt of the accused.[64] Public authorities and officials, including prosecutors, should inform the public about criminal investigations or charges, but should not express a view as to the guilt of any defendant. If a person is acquitted of a criminal offence by a court or tribunal, the public authorities, particularly prosecutors and the police, should refrain from implying that he or she may have been guilty.[65]

All trials must be open to the public, with few notable, and strictly construed exceptions. These include "reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice".[66] The UN Declaration on Human Rights Defenders sets out the right of trial observers and

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[57] Human Rights Committee, General Comment no. 32, *op. cit.*; Views of 23 October 1992, Communication 387/1989, Arvo O. Karttunen v. Finland, para. 7.2; European Court of Human Rights, Indra v. Slovakia, Application No. 46845/99, para. 49. See ICJ, Trial Observation Manual for Criminal Proceedings, *op. cit.*, p. 44 and following.

[58] See *inter alia*: the UN Guidelines on the Role of Prosecutors; Recommendation No. R (2000) 19 of the Committee of Ministers to Member States on the role of public prosecution in the criminal justice system; and Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa; Inter-American Commission of Human Rights, Report on the Situation of Human Rights in Mexico, OEA/ Ser.L/V/II.100, Doc. 7 rev. 1, paras. 372 and 381. European Court of Human Rights, Judgment of 10 July 2008, Medvedyev and others v. France, Application No. 3394/03, para. 61.

[59] Guideline 12 of the *Guidelines on the Role of Prosecutors.*

[60] Guideline 13, *ibid.*

[61] Guideline 14, *ibid.*

[62] Articles 14.2 ICCPR and 6.2 ECHR.

[63] Human Rights Committee, *General Comment No. 29*, *op. cit.,* para 16.

[64] Human Rights Committee, *General Comment No. 32*, *op. cit.,* para. 30; and Views of 20 July 2000, *Gridin v. The Russian Federation*, Communication No 770/1997, paras. 3.5 and 8.3.

[65] European Commission on Human Rights, *Krause v Switzerland*, Application no. 7986/77, para. 3; *Fatullayev v. Azerbaijan,* ECtHR, Application no. 40984/07, paras. 160–163; *Khuzhin and Others v. Russia*, ECtHR, Application no. 13470/02 paras. 93–97.

[66] Articles 14.5 ICCPR and 6.1 ECHR.

others to "attend public hearings, proceedings and trials so as to form an opinion on their compliance with national law and applicable international obligations and commitments".[67]

In accordance with the prohibition of double jeopardy, "[n]o one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country".[68] As ruled by the European Court of Human Rights, the right not to be tried twice for the same facts or omissions extends to the prosecution and not only to the trial phase.[69]

In the trial, the principle of equality of arms requires that trials comply with the principle of adversarial proceedings. This means that all parties should have the procedural opportunity to know the arguments and evidence being put forward by the opposing party, be able to refute and contest them and present their own arguments and evidence. This principle means that the accused has the right to examine, or have examined, any witnesses against him or her, and have witnesses appear and testify on his or her behalf under the same conditions as the witnesses who are testifying against him or her. This is clearly expressed in the rights enshrined in Articles 6.3.d ECHR and 14.3.e. ICCPR. The prosecution should, within a reasonable time prior to trial, provide the defence with the names of the witnesses that it intends to call at trial so as to allow defence counsel sufficient time to prepare their case.[70]

Testimony of anonymous victims and witnesses during trial is generally a breach of the due process of law. Anonymity may be permissible only in exceptional cases. In all cases, the identity of anonymous victims and witnesses must be disclosed to the defendant sufficiently in advance of the trial commencing so that a fair trial and the effectiveness of the right of defence can be ensured, and the accused can challenge the veracity of the testimonies.[71]

The right to an adequate defence requires adequate time and facilities, which is also protected as a specific element of the right to a fair trial in criminal cases under Article 14 ICCPR and Article 6 ECHR. This right entails a guarantee of access to documents, other evidence, and all materials the accused requires to prepare his or her case, including all materials that the prosecution plans to present in court either against the accused or that are exculpatory. Exculpatory material should be understood as including not only material establishing innocence, but also any other evidence that could assist the defence case; for instance, indications that a 'confession' was not voluntary. It includes the opportunity to engage and communicate with counsel. The right to be assisted by a lawyer, even if the individual cannot afford one, is an integral part of the right to a fair trial protected under international law.[72]

While the above are expressly conceived in international instruments as minimum standards, respect for them does not in and of itself guarantee the full fairness of the trial, which must be assessed holistically taking into consideration all factors that may influence the proceedings and decision in the case.

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[67] Article 9(3)(b), UN Declaration on Human Rights Defenders.

[68] Articles 14.7 ICCPR and 4 of Protocol 7to the ECHR.

[69] *Sergey Zolotukhin v. Russia*, Application no. 14939/03.

[70] CCPR, *General Comment no. 32*, *op. cit.*. International Criminal Tribunal for the Former Yugoslavia (Appeals Chamber), Judgment of 15 July 1999, The Prosecutor v. Tadic, No.IT-94–1-T; Human Rights Committee, Decision on admissibility of 30 March 1989 B.d.B. et al. v. The Netherlands, Communication No. 273/1988; European Court of Human Rights, Judgment of 27 October 1993, Dombo Beheer B.V. v. Netherlands, Application No. 14448/88; and Inter-American Commission on Human Rights, Report No. 52/01 of 4 April 2001, Case No. 12.243, Juan Raul Garza (United States of America).

[71] Human Rights Committee, *Concluding Observations of the Human Rights Committee: Canada*, CCPR/C/CAN/CO/5, 20 April 2006, para. 13; *Concluding Observations of the Human Rights Committee: United States of America*, CCPR/C/USA/CO/3/Rev.1, 18 December 2006, para. 18 and European Court of Human Rights, *Kostovski v. The Netherlands,* Application no. 11454/85, paras. 43–45.

[72] Article 14.3 ICCPR. See also article 6.3 ECHR.

12. Conclusions

Having observed all the hearings of the trial and analysed the relevant documents and circumstances, the ICJ and IBAHRI consider the "Gezi Park trial" to have all the characteristics of an unfair trial, and to contravene Turkey's obligations under the ICCPR and ECHR. These violations engage the responsibility of all involved State authorities, including prosecutors and judges.

a) The principle of legality and lawfulness of the prosecution

The defendants were charged with offences against the government and anti-terrorism offences. In Turkey, these kind of criminal offences have been shown to be regularly used by prosecutors not only to prosecute but equally to persecute political opponents and human rights defenders, among others.[73] To the extent that the objective of these prosecutions is to prevent or punish individuals in exercising internationally protected human rights and fundamental freedoms, this violates the ICCPR and ECHR. In particular, this includes the right to privacy and family life (Articles 8 ECHR and 17 ICCPR); the freedoms of expression, assembly and association (Articles 10 and 11 ECHR and 19, 21, and 22 ICCPR); and the right to political participation (Article 25 ICCPR). To the extent that prosecutions in this case may be purported to amount to a permissible limitation on any of these rights, they do not adhere to the aforementioned principle of legality; necessary for permissible restrictions of the right to a privacy and family life; freedoms of expression, assembly and association; and the right to political participation. Further, they can neither be said to be necessary nor proportionate for any legitimate purpose such as the protection of public order or national security.

The prosecution of the defendants does not respect their right to be subject to criminal penalties only according to a criminal offence prescribed by law (Articles 7 ECHR and 15 ICCPR) and the principle that all detention must be prescribed by law (Articles 5.1 ECHR and 9.1 ICCPR). This excessively broad interpretation of the offences with which the defendants have been charged has already been considered by the European Court of Human Rights as not in line with Turkey's obligations under the European Convention on Human Rights. Repeated reforms of these offences have not modified the scope of their application in practice.[74]

The indictment itself demonstrates a lack of professionality, independence and impartiality.

As the European Court of Human Rights noted in its judgment on the lawfulness of the detention of Osman Kavala, there was no:

- *evidence in the file, particularly in the decisions on the initial and continued detention, or in the bill of indictment, to the effect 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.*[75]

[73] See, *inter alia*, ICJ, *Justice Suspended, op. cit.;* Venice Commission, *Opinion on articles 216, 299, 301 and 314 of the Penal Code*, Opinion No. 831/2015, 15 March 2016; Commissioner for Human Rights of the Council of Europe, *Report following her visit to Turkey from 1 to 5 July 2019,* 19 February 2020, Ref. CommDH(2020)1; UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Report on his mission to Turkey, UN Doc. A/HRC/35/22/Add.3, 21 June 2016.

[74] See, all judgments by the European Court of Human Rights on these offences and the execution procedure carried out by the Committee of Ministers of the Council of Europe (still open) in the *Oner and Turk v. Turkey* group: http://hudoc.exec.coe.int/eng?i=004-36806

[75] ECtHR,. Kavala v TUrkey, para. 143

More specifically the Court held:

- *223. This document, 657 pages in length, does not contain a succinct statement of the facts. Nor does it specify clearly the facts or criminal actions on which the applicant's criminal liability in the Gezi events is based. It is essentially a compilation of evidence — transcripts of numerous telephone conversations, information about the applicant's contacts, lists of non-violent actions –, some of which have a limited bearing on the offence in question… there is nothing in the case file to indicate that the prosecuting authorities had objective information in their possession enabling them to suspect, in good faith, the applicant at the time of the Gezi events. In particular, the prosecution documents refer to multiple and completely lawful acts that were related to the exercise of a Convention right and were carried out in cooperation with Council of Europe bodies or international institutions (exchanges with Council of Europe bodies, helping to organise a visit by an international delegation). They also refer 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.*
- *224. In the Court's view, the inclusion of these elements undermines the prosecution's credibility. In addition, the prosecution's attitude could be considered such as to confirm the applicant's assertion that the measures taken against him pursued an ulterior purpose, namely to reduce him to silence as an NGO activist and human-rights defender, to dissuade other persons from engaging is such activities and to paralyse civil society in the country.*[76]

In a State governed by the rule of law, the issuance of such an indictment would warrant at the very least investigation and review with the view to preventing similarly problematic future indictments being issued. Yet the ICJ and IBAHRI were not informed of any inquiry or disciplinary action undertaken against the authors of this document.

b) The right to fair trial before a competent, independent and impartial tribunal established by law

With regard to the institutional independence of the judiciary and the prosecution, the ICJ and IBAHRI have reported in detail on the problems in these institutions which currently do not enjoy the basic guarantees to ensure their independence.[77]

A tribunal in which judges have been appointed or may be subject to disciplinary or transfer proceedings by a Council of Judges and Prosecutors whose composition by law does not respect the basic tenets of the international standards on judicial independence cannot qualify as an 'independent' one. This lack of independence depends not only on the demeanour or actions of individual judges but equally on institutional guarantees that protect such judges from any internal or external interference. The lack of such institutional independence was demonstrated by the initiation of disciplinary proceedings by the Council of Judges and Prosecutors against those judges who, in this case, acquitted the defendants.

With regard to the proceedings the trial observers reported that the composition of the judicial chamber changed frequently, making it impossible to ensure a coherent judicial panel reaching a unified, informed and reasoned decision. This fact is a further sign of the incapacity of the Turkish legal system to ensure that a politically sensitive trial such as that under observation may be

[76] *Kavala v. Turkey*, *op. cit.*, paras. 223–224.

[77] See, among others, ICJ, *Justice Suspended, op. cit*; ICJ, *Justice in Peril, op. cit*.

untainted by suspicions of external and internal influence. This is corroborated by the impression by ICJ and IBAHRI observers that the behaviour of the judges showed a distinct lack of interest in the trial itself.

Cumulatively, these elements contribute to a conclusion that the defendants in this trial were not accorded their right to be tried by an 'independent and impartial court', in breach of Article 6 ECHR and Article 14 ICCPR. Their final acquittal does not have impact upon this conclusion.

c) The right to be presumed innocent until proved guilty according to the law

State authorities have a duty not to prejudice the proceedings and outcome of a criminal trial by expressing opinion on the guilt or innocence of its defendants. This is most acutely true with respect to the senior offices of State.

The fact that the President of the Republic of Turkey, who currently has constitutional powers of control over the governing bodies of the judiciary, both anticipated the guilt of the defendants and complained of their acquittal in public statements, shows clearly that not even the appearance of independence has been respected in these proceedings.

His statements constitute a fundamental breach of the defendants' presumption of innocence, in itself a clear violation of the defendants' right to a fair trial.

d) The right to equality of arms and to test evidence through cross-examination of witnesses

The Court's approach in the admissibility of witnesses is another element that leads the ICJ and IBAHRI to conclude that this trial did not satisfy the essential fair trial requirement of the equality of arms between the parties. As noted, the trial judges refused to hear defence witnesses, namely the co-defendants resident abroad, stating that they should have been physically in Istanbul to testify. On the other hand, however, the judges allowed all prosecution witnesses without question, including a previously unannounced one who could not be properly counter-examined. This contravened the right to test evidence through cross-examination and adequate provision of time and facilities for one's defence (Article 6.3.d ECHR; Article 14.3.e ICCPR).

e) Main conclusions and recommendations

The ICJ and IBAHRI conclude that the Gezi Park trial did not meet the requirement of a fair trial under Article 6 ECHR and Article 14 ICCPR. Specifically, the rights to be tried by an independent and impartial court, the presumption of innocence and to call and cross examine witnesses were not respected.

The ICJ and IBAHRI further affirm that this trial was already compromised due to the clear violation of the principle of legality in relation to the criminal law applied in this case as well as in respect of the grounds for detention, which failed to satisfy Articles 9 and 15 ICCPR and 5 and 7 ECHR. The criminal charges brought against the defendants relate to offences that are overly broad and prone to unduly restrict the exercise of human rights, notably the freedoms of expression, association and assembly, political participation, privacy. The indictment itself is clear testimony to the groundlessness of the accusations against the defendants.

Based on their findings, the ICJ and IBAHRI recommend that:

a. **That Osman Kavala be immediately released and that all charges against him be withdrawn**

b. **That, if an appeal is brought by the prosecution, the acquittal be confirmed by all higher courts and extended to all offences and defendants;**

c. **That in respect of the defendants who were absent from the trial, the prosecution withdraw any charges against them related directly and indirectly to the facts contested therein;**

d. **That all defendants be granted reparations, including compensation, for the time of unlawful detention and baseless prosecution; and**

e. **That any disciplinary proceedings against the judges that issued the verdict of acquittal be immediately withdrawn.**

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