

TURKEY: Trial Observation: Altan and Others

Addendum Report

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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 over two hundred lawyers, comprised of barristers practicing at the Bar of England and Wales, legal academics and law students. The 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 executive officer.

The 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;
- advise, support and co-operate with other organisations and individuals working for the promotion and protection of human rights; and
- advise the Bar Council of England and Wales in connection with international human rights issues.

As part of its mandate, the 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 the 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, critic and advisor.

Executive Summary

1. On 19 September 2017, Pete Weatherby QC, Executive Member of the BHRC attended the second phase of the trial of seven journalists and media workers charged with involvement in the failed July 2016 coup: *Altan and Others*. Another ten accused are included in the indictment but have not been apprehended. BHRC attended the first stage of the trial in June 2017 and the full trial observation report can be viewed here: <http://www.barhumanrights.org.uk/wp-content/uploads/2017/09/Turkey-Report-June-2017.pdf>. This is an addendum to the first report and should be read as such.
2. In the first report BHRC raised a number of issues regarding the trial and the context in which it is taking place. In particular, BHRC raised concerns about:
 - a. The continuing 'State of Emergency' which has centralised power in the hands of the president.
 - b. The dismissal of around 170,000 judges, prosecutors, civil servants, police and army officers and academics, and the arrest and detention of around 50,000 people on charges of involvement in the coup. Those detained and charged include judges, lawyers, human rights defenders and journalists.
 - c. The lack of independence of the judiciary caused by the dismissal and detention of judges and prosecutors deemed not to support the Government, and by changing the power to appoint judges from an independent committee to Presidential decree.
 - d. Serious due process shortcomings in the trial.

BHRC concluded that this was a 'show trial' and represented a serious attack on freedom of expression.

3. The second hearing at Istanbul's 26th High Criminal Court in Caglayan Courthouse, was due to hear evidence from two witnesses. Without explanation, the witnesses did not attend.
4. The court therefore received physical exhibits (six \$1 bills) in the case of Mehmet Altan, and heard submissions from the accused and their lawyers as to the paucity of the cases against them, the effect of an important new decision of the Court of Cassation concerning coup cases, and for release on judicial control (bail). Lawyers for the accused also made submissions regarding restrictions on legal visits with their clients and the fact that they are monitored and recorded.
5. The prosecutor gave a brief reply before the judges:
 - a. Formally abandoned the evidence of the two witnesses (the only ones who were to be heard orally).
 - b. Severed the cases of the ten accused who had not been apprehended.
 - c. Rejected the submissions of the accused for dismissal and for release.
 - d. Rejected submissions that lawyers should be allowed to visit the accused for more than one hour a week as presently permitted, and without having privileged conversations monitored and recorded.
 - e. Fixed the next hearing for 13 November 2017.

Acknowledgments

6. The mission was assisted by P24 (Turkish 'Freedom of Expression' NGO) and Article 19. BHRC is grateful for the assistance given.

Funding

7. The mission was funded from BHRC central funds, provided in part by the Bar Council of England and Wales and annual contributions by BHRC members.

Hearing observed

8. The Hearing on 19 September 2017 lasted for one full day and was the second phase of the trial.
9. Two of the three judges from the first phase of the trial were replaced. No explanation for this change was stated.
10. The Court consisted of:

CHIEF JUDGE: Kemal Selçuk YALÇIN
JUDGE: Kadir ALPAR
JUDGE: Recep KURT

PROSECUTOR: İLKAY ÖZCAN

11. The Defendants and representation were as follows:

AYŞE NAZLI ILICAK: Atty. MİKAİL HASBEK, Atty. MUSTAFA ÖZKURT,
Atty. NEBİ MÜRSEL İNCE

AHMET HÜSREV ALTAN (appearing by videolink from Silvri Prison)
Atty. VEYSEL OK and Atty. ERGİN CİNEMEN

MEHMET HASAN ALTAN: Atty. VEYSEL OK and Atty. ERGİN CİNEMEN

FEVZİ YAZICI: Atty. SEVGİ TAŞ

ŞÜKRÜ TUĞRUL ÖZŞENGÜL:
Atty. MUSTAFA BAL

YAKUP ŞİMŞEK: Atty. MESUT YAZICI and Atty. ERDOĞAN BAL

TİBET MURAT SANLIMAN: Atty. BAHRİ BAYRAM BELEN

12. The Court was due to hear evidence and cross-examination of two prosecution witnesses: Nurettin Veren and "Söğüt", an anonymous witness. These were the only two witnesses in the case, other than the defendants, who were to give oral evidence. The witnesses did not attend and have been formally abandoned.
13. The Court received exhibits in the case against Mehmet Altan in the form of six \$1 bills allegedly found at his home. It is alleged by the prosecution that possession of \$1 bills is evidence of membership of the Gulenist organisation that the Government blames for the failed coup. Mehmet Altan, an academic and journalist has indicated in his testimony that he has travelled widely in his

professional roles and it would have been surprising if he did not have a variety of foreign currency at his home. Furthermore, it is noted that Mehmet Altan is one of the defendants who is specifically charged with assisting the Gulenists *without* being a member (in contradistinction to others on the indictment who are said to be members). Evidence of proof of membership is therefore contradictory to the allegation on the indictment.

14. The Court heard and rejected submissions from the defendants and their lawyers for dismissal of the charges and in the alternative for release on judicial control (bail). Furthermore the Court heard and rejected applications for the defendants to be given greater access to their lawyers (currently restricted to one hour per week) and for legal visits not to be monitored and recorded.
15. Similar to the first phase of the trial the proceedings were listed in a court that was manifestly too small for the number of defendants, lawyers, journalists, family members and observers. The judge declined to hear submissions from defence lawyers that the trial should be moved to a larger courtroom. Shortly after the proceedings commenced the presiding judge silenced the translator assisting the BHRC observer despite being informed of her identity and purpose by counsel. Fortunately, the translator managed to continue by typing on a computer.

Meetings undertaken

16. Well in advance of the second phase of the trial, BHRC attempted to contact the Turkish Justice Ministry, Prosecution Service and the Turkish Embassy in London, as we had before the first observation, but unfortunately, we received no acknowledgement or reply. To date, there has been no response to our letters and emails. It assists and is recommended practice for the state to engage with trial observers. BHRC will forward this addendum report to the Turkish Justice Ministry, Prosecution Service and the Embassy in London, to allow the opportunity for comment and to pursue engagement in the future.
17. Prior to this phase of the trial, BHRC met with one of the accused who has not been apprehended and is seeking asylum in London. This individual indicated that it was clear that he/she could not receive a fair trial. The individual stated that he/she had no prior knowledge of the coup attempt and asserted that he/she had not assisted or in any way supported it.
18. BHRC met with a number of defence counsel, and members of P24 and Article 19 during this observation. BHRC gratefully acknowledges the assistance and information provided to us.
19. BHRC was also pleased to meet with Mehmet Durakoglu, President of the Istanbul Bar Association and Att Metin Uraçin, President of the Foreign Relations Centre of the IBA. Mr Durakoglu expressed the strong view that those responsible for the coup should be arrested and prosecuted but only with proper due process. He noted that some of those accused of involvement in the coup were allies of the Government in the past and that after the coup

failed the Government used the state of emergency as an opportunity to centralise power and rule by decree, harming democracy and silencing opponents who had nothing to do with the coup. The independence of the judiciary and the rule of law had been undermined.

Compliance with International Standards

20. In the main report, BHRC noted many concerning features of this case and with Turkey's compliance with international obligations, in particular under the ICCPR and ECHR. BHRC makes further comments under the same headings.

A. The State of Emergency

21. Since the first phase of this trial Turkey has further extended the State of Emergency on two occasions and there are few signs that it will be brought to an end anytime soon. Further three-month extensions were announced on 17 July 2017 and 13 October 2017¹.

22. BHRC reiterates its concern that the State of Emergency continues fifteen months after the failed coup, without proper justification. The declaration of a SoE was lawful under the Constitution but its continuance is only permissible if absolutely necessary. The SoE may well have been necessary to protect the Turkish democratic system immediately following the coup, but its continuance undermines that which it should have protected. The excessive number of dismissals, detentions and prosecutions – particularly of judges, prosecutors, lawyers, human rights defenders and journalists – raises serious questions as to whether the President and ruling AKP party are using the SoE to legitimately deal with the coup or whether they are abusing emergency powers to remove all opposition and suppress freedom of expression.

B. The Right to an Independent, Impartial and Competent Tribunal

23. BHRC has raised concerns regarding the fact that that judges are now appointed by the President rather than by an independent committee and has noted concerns of local lawyers that new judges are being chosen by political allegiance.

24. In that context BHRC was most surprised to observe that two of the three judges who sat on the first phase of this trial had been replaced, without explanation, for the second phase. As the judges not only determine legal issues and regulate the trial process but also determine the facts, it is most irregular for there to be a change of a majority of the bench in this way.

¹ <http://www.yenisafak.com/en/news/turkey-to-extend-state-of-emergency-2795776>

25. One of the implications of sections 2 and 6 of the UN Basic Principles on the Independence of the Judiciary² is that, during the course of a trial, judges must conduct themselves in a manner which is not only fair to the parties but seen to be so. Once the panel of judges is seized of the case that means they must judge the matter only on the admissible evidence adduced during the trial and the submissions of the parties. If judges change during the trial, it is plainly impossible for them so to do.
26. In this case there has in fact been no oral evidence beyond the statements of the defendants themselves – which was unchallenged by cross-examination by the prosecution. This reduces the impact of a change in judicial personnel between the hearings but nevertheless the mid-trial change of judges constitutes a significant breach of Article 14 ICCPR, Article 6 ECHR and the UN Basic Principles.
27. In the context of this trial the change of judges also tends to confirm fears that verdicts will be based upon political interference and not the evidence before the court.

C. The Right to Legal Assistance & D. The Right to Adequate Time and Facilities to Prepare a Defence

28. At para 61 of the main report, BHRC drew attention to the fact that the right of confidential access to lawyers was impeded by the requirement for all legal papers, including privileged statements and instructions, to be passed, to and from clients, through state authorities. At paras 65-66 BHRC noted that if inadequate access to defendants is granted, further issues may arise under Article 6.
29. BHRC's concerns are heightened by the rejection of defence applications during the second phase of the trial seeking to remove the one hour limit on

² <http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx> Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985:

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 of interferences, direct or indirect, from any quarter or for any reason.

6. The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.

legal visits to defendants and to remove monitoring and recording of such visits.

30. BHRC notes that a central argument of the defence in this case is a lack of cogent inculpatory evidence against each defendant, nevertheless, within reasonable boundaries, it is for legal representatives to determine how much access to clients is required for the purposes of mounting an efficient case. Monitoring and recording of legal visits and correspondence can be justified in only the most extreme circumstances.

E. Sufficiency of Evidence

31. The second phase of trial did not result in the adducing of any further testimony as the two witnesses failed to appear and were abandoned by the prosecution. The Court has acknowledged that there will be no further evidence in this case.
32. In submissions arguing for dismissal and, in the alternative, release on bail, defence lawyers cited a superior court authority, delivered since the first phase of this trial, which significantly limits the permissible ambit of charges arising from the attempted coup. The July 2017 ruling of the 16th Criminal Chamber of the Court of Cassation makes clear that:
 - a. Defendants must have engaged in or incited actual violence and physical force and words alone are not sufficient to meet this threshold,
 - b. Defendants must have wilfully participated in or incited that violence and mere foreknowledge of an act is not sufficient to meet this threshold, and
 - c. Attempting to overthrow the Parliament, the Government and the Constitutional Order should not be drafted as three separate counts each attracting separate life sentences.
33. BHRC reiterates its concerns over the lack of specificity of the indictment charges and the apparent lack of evidence to substantiate the offences charged.
34. In its ruling, the court failed to respond to the submission based upon the recent Court of Cassation authority, despite its clear relevance to issues of both dismissal and release on judicial control, and its binding effect on the court.

F. Open Justice

35. In the main report, BHRC drew attention to the shortcomings in allowing access to the trial court for families, journalists and international observers.
36. Regrettably, these problems persisted during the second phase. Apart from the failure to provide a court room with sufficient spaces for relatives and others, Italian Consulate officials had trouble accessing the court and the Presiding Judge silenced an interpreter assisting BHRC.

37. For both observations in this case, BHRC has written to the court, the Justice Department and the Embassy requesting proper access to the court – without reply on each occasion.
38. BHRC reiterates the assertion at para 84 of the main report that a court and judicial system upholding high standards and complying with international due process obligations would be expected to give appropriate access, not least so that it could be seen to be so doing. It is disappointing that the Justice Department and Embassy have still failed to reply to communications raising such concerns.

G. Freedom of Expression

39. BHRC restates that this trial is only one of several indicting Turkish journalists with offences connected to the coup. There are presently at least 169 journalists facing criminal trials in Turkey. According to the *Committee to Protect Journalists*, Turkey currently detains more journalists than anywhere else in the world³.

Conclusions and Recommendations

40. BHRC has now attended the first and second substantive phases of the trial of *Altan and Others* and spoken with as many lawyers, relatives, consulate officials, and NGOs concerned with this and other journalist cases which have followed the failed coup, as has been possible. It is understood that the next hearing on 13 November 2017 will be the final one and judgment will follow thereafter.
41. It is a matter of considerable regret that BHRC communications to the prosecution, the Department of Justice, the court and the Turkish Embassy in London, prior to both trial stages, have all gone unanswered. It is internationally recognised good practice for the State to engage with trial observers.
42. Following the second phase of the trial, BHRC notes that this prosecution is but one of many following from the failed coup. Turkey is not only entitled to prosecute alleged coup participants and conspirators but is required to do so under its constitution and international instruments which obligate it to have a system of laws to protect life and limb. However, BHRC reiterates its concerns that the response to the coup – the mass detentions and trials, the huge number of dismissals, the continuance of the state of emergency, changes to the constitution to vastly increase executive power, and the suppression of opposition – has done precisely that which the government charges the alleged plotters: diminished the rule of law and substantially undermined the democratic institutions. In particular, the independence of the judiciary has effectively been removed and many judges and lawyers have been arrested and detained.

³ <https://cpj.org/imprisoned/2016.php>

43. BHRC repeats its earlier assertion that the trial of *Altan and Others* has the appearance of a 'show trial' intended to suppress freedom of expression in Turkey. The mass dismissals and detentions of judges, lawyers, human rights defenders and others, appears to be designed to remove all opposition to the Government rather than being a legitimate response to the coup.
44. BHRC repeats its recommendations from the main report in urging the government and judiciary (where appropriate) to:
 - a. Honour its constitutional and international commitments to the rule of law and fundamental rights and protections;
 - b. Re-evaluate whether the state of emergency remains necessary,
 - c. Introduce measures to reinstate the independence of the judiciary and prosecuting service.
 - d. Release all detainees and discontinue charges unless there is clear and substantial evidence of actual criminality.
 - e. Make a public commitment to ensure that freedom of expression is robustly protected and that journalists will be safeguarded from arrest and prosecution for investigating, reporting and commenting on issues of the day.