BAR HUMAN RIGHTS COMMITTEE OF ENGLAND & WALES

INTERIM TRIAL OBSERVATION REPORT

The "Gezi Park" Trial / Osman Kavala

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About the Bar Human Rights Committee

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

BHRC aims to:

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

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

The “Gezi Park” trial (Osman Kavala)

Introduction

1. The Bar Human Rights Committee of England and Wales (BHRC) has continued to observe and monitor the “Gezi Park” trial of sixteen leading civil society individuals in Turkey, including Osman Kavala and Yiğit Aksakoğlu. The trial was in session for a day on **28 January 2020** at a court situated in Silivri Prison outside Istanbul. Mr Kavala remains the only defendant still in custody and has now been detained for over 27 months.

2. It is a matter of ever-growing concern that Mr Kavala continues to be detained in respect of an indictment which is gravely flawed, and in defiance of an unequivocal decision by the European Court of Human Rights (ECHR) on **10 December 2019** calling for his immediate release from custody. Instead, it is evident that Turkey is continuing with a meritless prosecution that has little to do with ordinary and proper trial procedures. The defendants remain accused of the gravest charges, facing aggravated life sentences upon conviction. The deviation from legitimate prosecutorial aims and fair trial standards is hugely worrying.

3. On behalf of BHRC, Kevin Dent QC attended the hearing on 28 January 2020 supported by the freedom of expression organisation, Article 19. We will continue to follow and monitor the trial alongside Article 19 and other international observers.

The 10 December 2019 ECHR decision

4. Overshadowing the hearing on 28 January 2020 was the continued non-implementation of ECHR ruling of 10 December 2019 in the case of **Kavala v. Turkey (application no. 28749/18**) in which the ECHR held that there had been a violation of Article 5 § 1, Article 5 § 4 and Article 18 and ruled that Turkey was to take every measure to put an end to the Mr Kavala’s detention and to secure his **immediate** release.

5. The EHCR ruling was critical of Turkey’s entire approach to the case, finding it established beyond reasonable doubt that the prosecution is being pursued for

the ulterior purpose of silencing Mr Kavala and, with him, all human-rights defenders in Turkey. The ECHR judgment is explained and analysed more fully in an **annex** to the previous interim trial report for the 24 December 2019 hearing.

6. It is now eight weeks since the ruling.

The 28 January 2020 hearing

7. Although on 28 January 2020 the Court was presided over by the same panel of three judges as on the previous two hearings, concerns remain, however, about interference with the allocation of judges for the case. At the hearing on 8 October 2019, for instance, it was of note that the previous presiding judge had been replaced.

8. As at previous hearings, the Istanbul 30th Serious Crime Court at Silivri was marked by an overwhelming security and military presence. It was of note that there were large numbers of police in full riot gear, soldiers carrying lengthy batons and even a tank outside the court building. Inside the court room, there was a cordon of soldiers and a large security presence. Whilst it is of course a matter for the Turkish authorities to maintain the security of the courtroom and staff, BHRC has concerns about the level of armed security deployed in these proceedings. Apart from anything else, this overwhelming military presence may create an atmosphere suggesting that the Defendants are so dangerous as to merit this response, which does not seem compatible with the presumption of innocence enshrined in Article 6(2). Given that the Defendants are made up of writers, filmmakers and members of civil society, the level of security presence is disproportionate.

9. The judges indicated at the outset that the decision of the ECHR on 10 December 2019 was in contradiction with the decision of the Turkish Constitutional Court and 'not finalised'.

Evidence given in private by Murat Papuc

10. The proceedings then continued with submissions by various defence lawyers about the testimony which had been given to the Court on 24 December 2019 by witness Murat Papuc in closed session in the absence of the defence lawyers

and defendants. The ostensible reason provided by the Court for this measure was because the witness had claimed to be fearful for his life if the evidence were not taken in private.

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

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

Joint statement of the Turkish Bar Associations

12. Indeed, one of the lawyers, Head of the Istanbul Bar Association Mehmet Durakoğlu, presented to the Court a joint statement on behalf of a number of Turkish Bar Associations nationwide, condemning the decision to hear this evidence in closed hearing as an attack on the Defence Bar that undermines their role in safeguarding the rights of accused. The statement is set out in an annex to this report.

13. BHRC considers that this joint statement reflects a widespread concern by lawyers and rights defenders in Turkey about the lack of observance of proper legal processes. It is noteworthy that the joint statement comes from Bar Associations from different parts of the country unconnected to the present case, indicating that these events in Silivri have an impact that extends far beyond the present case.

The significance of witness Murat Pupac

14. It became clear during the hearing that this witness is a key one to support the prosecution's general theory that Osman Kavala and others organised the Gezi Protests in 2013 and with the aim of overthrowing the state by violence. During the hearing, one of the judges read parts of the transcript of the testimony given by the witness in private on 25 December 2019. It included an account to the effect that:

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

15. There are a number of aspects of his account that, at the very least, call for close scrutiny such as why the witness kept the gas mask for 5 years before passing it to the authorities around the time when the indictment was being prepared. It is therefore highly important, particularly in a trial of this gravamen, that the lawyers for the accused have the opportunity to challenge the account given by this witness in open court. If, as was indicated in court, the witness has certain psychological difficulties, it becomes even more important that his account can be carefully tested.

16. It is a matter for the Court to ensure that any challenge to the testimony of a witness can be conducted in a fair way, including fairness to a witness who may be vulnerable. BHRC see no reason, however, why this witness could not be heard in open court under careful case management and consider this failure to do so is incompatible with the Defendants' right to a fair trial. Article 6(3)(d) states that everyone charged with a criminal offence has as, a minimum, the right to examine or have examined witnesses against him. This has manifestly been breached in these proceedings.

17. This breach is exacerbated by the Defence not being provided with an audio or video recording of the evidence of Murat Pupac, only a transcript of it.

Submissions regarding additional complainant Murat Saldogan

18. There were submissions by the defence seeking a reversal of the decision announced at the hearing on 24 December 2019 that a notorious police officer, Murat Saldogan who had been jailed for his part in kicking to death Gezi protestor Ali Ismail Korkmaz, would be added to the long list of complainants. The injury it is claimed he had suffered was to his foot, whilst kicking the protestor to death, and to the damage to his career and family life following his conviction. These submissions caused the mother of the deceased protestor, who was present in court, to rise and address the Court from the public gallery in obvious upset.

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

20. BHRC can see no legitimate legal reason for Murat Saldogan to be added to the already long (300+) list of complainants in this case. Indeed, the inclusion of Mr Saldogan is extraordinary and underlines the growing sense that ordinary prosecutorial objectives have been overridden in this case. This move is entirely consistent with the ECHR's ruling on 12 December 2019 in relation to Article 18 that the prosecution had not been brought to pursue legitimate aims but to subdue and suppress activists and rights defenders.

Submissions on recusal

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

three judges should recuse themselves.

Judgement following submissions

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

    - The decision to hear the evidence of Murat Pupac in private stood;
    - The additional complainants including Murat Saldogan would retain that status;
    - The petition for the judges to recuse themselves was rejected.

Response by the defence lawyers

23. Immediately following these rulings, a defence lawyer informed the court on behalf of all the defence lawyers that, as the Court ruled that evidence of Murat Pupac would not be withdrawn, they would not participate further at the hearing. The defence lawyers walked out of the Court, save for lawyer Hurrem Sonmez who represents some of the Defendants living abroad and absent from the proceedings.

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

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

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

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

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

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

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

Submissions made by Osman Kavala concerning his release

30. Osman Kavala then made submissions concerning his continued detention, to the effect that:
    - The ECHR ruled that the indictment contained no evidence that he had organised and financed the Gezi protests. They had ruled that this to be a meritless case which lacked reasonable suspicion of a crime.
    - To deny a person their liberty without an evidential basis is a clear violation of the European Convention.
    - The ECHR had declared that he should be immediately released and it was, therefore, a further violation of his right to a fair trial that the Court had declared that the ECHR decision is 'not final.'
    - The behaviour of this court shows complete disregard of the fact that the liberty of the person is safeguarded by the constitution and the European Convention.

31. As indicated above, BHRC consider that Osman Kavala should be released

immediately in accordance with the ruling of the ECHR that the authorities in Turkey should do exactly that.

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

33. The proceedings concluded with the judges re-iterating that;

- The addition of the new Plaintiffs would remain;
- They considered the ECHR decision calling for Osman Kavala to be released was 'not final' and, in the interim, he would not be released;
- The next hearing would be on 18 February 2020.

Commentary

34. BHRC has previously stated that the extraordinary and obviously flawed indictment, and the length of Mr Kavala's detention all lend the clear impression, confirmed by the ECHR, that the proceedings are being abused in violation of Article 18 ECHR, in conjunction with Article 5, and condemns the use of terror proceedings and detention as reprisals against human rights defenders, whether they be lawyers, journalists, judges or civil society.

35. The continuation of this trial in the manner that we have described, the failure to release Mr Kavala from detention, and the prosecution's call for aggravated life sentences underline and heighten our assessment that these criminal proceedings are being used in a retaliatory and intimidatory manner.

36. The attempt to cast peaceful Gezi Park protestors within the net of violent terrorism, retrospectively and without recourse to the evidential threshold required of the Prosecutor, has a chilling effect on the present and future adherence to international laws and standards, as well as for civil society in Turkey. So, too, does the failure to heed and follow the judgment of the European Court of Human Rights.

37. The proceedings on 28 January 2020 represented a new low for this case,

involving the confirmation of a police officer jailed for killing a protestor as an 'injured party' in the proceedings and the acceptance by the Court of testimony by a crucial witness given in closed session without proper testing by the defence.

38. Overshadowing even those events was the continuing refusal of the Court to implement the clear and unequivocal ruling of the ECHR on 12 December 2019 that Osman Kavala be released. There is a fear that Turkey will not abide by the ruling and, instead, may seek to conclude the trial before the decision has been implemented. Were this to occur, this would seriously undermine Turkey's reputation for the observance of the rule of law.

Contrast with the submissions made at the UN Universal Periodic Review

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

40. At paragraph 23 of its submissions to the UN, Turkey states that the main pillars of its Judicial Reform Strategy are:

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

41. BHRC note that the decision to hear a crucial witness in the absence of the defence is not consistent with the declared aim of facilitating access to justice, strengthening the right of defence in criminal proceedings.

42. Likewise, regarding the right to be tried within reasonable time, by its ruling on this case on 10 December, the ECHR held that Turkey had been in breach of the obligation under Article 5(4) to rule on the lawfulness of Osman Kavala's

pre-trial detention within a reasonable time. For sixteen months after being placed in detention, Mr Kavala had been detained without having been charged. The EHCR observed in its ruling that that, as the Commissioner for Human Rights pointed out, the extension of Mr Kavala's detention in this way could have a dissuasive effect on the non-governmental organisations whose activities were related to matters of public interest. Moreover, Osman Kavala has now been in detention for over 27 months.

43. At paragraph 30, it is stated that:

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

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

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

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

46. At paragraph 81 concerning Freedom of expression and the media, Turkey states:

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

47. BHRC note that, according to statistics provided by the Committee for the Protection of Journalists, as of December 2018, Turkey had more journalists in prison than any other country.

48. Regarding the right to peaceful assembly and association, Turkey states at paragraph 86:

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

49. BHRC note that the ECHR decision of 10 December 2019 ruled in relation to Article 18 that it established beyond reasonable doubt that the prosecution in the present case pursued an ulterior purpose, namely that of reducing the Mr Kavala to silence. Further, it considered that the measures were likely to have a dissuasive effect on the work of human-rights defenders.

50. Paragraphs 230-232 of the ECHR ‘Kavala’ judgement read as follows:

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

governmental organisations in a pluralist democracy (see paragraph 76 above).

In the light of above-mentioned elements, taken as a whole, the Court considers it to have been 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.

In view of the foregoing, the Court concludes that there has been a violation of Article 18 in conjunction with Article 5 § 1 of the Convention."

51. BHRC call upon Turkey to make good on its submissions to the UN. In relation to the present case, this involves:

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

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

Annex

Joint statement of the Turkish Bar Associations

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Adana Bar Association
Ankara Bar Association
Antalya Bar Association
Aydın Bar Association
Bursa Bar Association
Diyarbakır Bar Association
Istanbul Bar Association
İzmir Bar Association
Mersin Bar Association
Tunceli Bar Association
Urfa Bar Association
Van Bar Association”