

Legal report on indictment:
**Turkey v Osman Kavala
& others**

The Gezi Park trial

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For PEN Norway's Turkey Indictment Project.

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Turkey Indictment Project by PEN Norway

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Caroline Stockford, PEN Norway's Turkey Adviser, leads the project. Aşkın Duru is the Turkish coordinator for the project.

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NB! This report was prepared prior to the new indictment from 29 September 2020 against Osman Kavalá. Reviewing the conclusions in this report, we hope that the court would not accept any indictment that does not conform to Turkish and International legal standards.

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PART A: INTRODUCTION

1. This legal report is drafted by Kevin Dent QC as part of the Turkey Indictment Project, established by PEN Norway, and represents an analysis of the indictment in the case of **Turkey v Osman Kavala and others**, popularly known as the “**Gezi Park**” trial. These proceedings concerned the prosecution and trial of 16 individuals (made up of civil society activists, lawyers, and artists) for their alleged role in the protests that took place in Turkey in 2013 against the redevelopment of Gezi Park, a green space in the center of Istanbul. These proceedings ostensibly ended in February 2020 with the acquittal of all nine of the defendants who attended their trial. It is understood, however, that the prosecution have appealed the acquittals and this appeal process has not yet concluded.
2. The lead defendant in the proceedings, Osman Kavala, who is a well-known philanthropist, former advisory member of the board of Open Society Turkey and civil society activist, successfully referred his case to the European Court of Human Rights (ECtHR). This court ruled, on 10 December 2019, that Turkey had violated Mr. Kavala’s rights under the European Convention on Human Rights (hereafter “ECHR”) in respect of Articles 5.1 (a lack of reasonable suspicion that Mr. Kavala had committed a criminal offence) article 5.4 (right to a speedy determination on the lawfulness of detention) and article 18 (limitation on the use of restriction of rights) and called for him to be immediately released.¹
3. Despite this, and in defiance of this clear judgment of the ECtHR, Mr. Kavala remains in detention and has now been detained for more than 1000 days.
4. On 4 September 2020, the Committee of Ministers of the Council of Europe urged Turkey once again to ensure the immediate release of Mr. Kavala.²

¹Kavala v Turkey (ECtHR 429 (2019)).

²https://search.coe.int/directorate_of_communications/Pages/result_details.aspx?ObjectId=09000016809f7230

5. The Bar Human Rights Committee of England and Wales (BHRC) observed the hearings of the trial as part of its international trial monitoring program and have reported extensively on the proceedings.³ This report draws on the experiences of BHRC in Turkey and in observing this trial in particular.

About the Bar Human Rights Committee of England and Wales

6. 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 lawyers, comprised of barristers practicing 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 Officer and a part time administrator.

7. BHRC aims are:

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

8. 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, critic and advisor.

³ https://www.barhumanrights.org.uk/wp-content/uploads/2020/05/BHRC-Trial-Observation-Report_Osman-Kavala_May-2020_forweb.pdf

PART B: SUMMARY OF THE CASE AND INDICTMENT

9. The protests in 2013, that stemmed from plans to redevelop Gezi Park in central Istanbul, are already widely-reported and are well summarised in the ECtHR judgement. In September 2011, the Istanbul Metropolitan Municipal Council (Istanbul Büyükşehir Belediye Meclisi) adopted a plan to pedestrianise Taksim Square in Istanbul. This plan included blocking traffic routes around Taksim Square and rebuilding barracks (demolished in 1940) in order to create a shopping centre in the new premises. These barracks were to be built on the site of Gezi Park, one of the few green spaces in the centre of Istanbul.⁴

10. Professional bodies such as the Chamber of Architects and the Chamber of Landscape Architects brought administrative proceedings in an attempt to have this project set aside. In 2012, several demonstrations were organised to protest against the planned destruction of Gezi Park. Platforms bringing together several associations, trade unions, professional bodies and political parties, including the “Taksim Solidarity” (Taksim Dayanışma) collective, were accordingly set up to coordinate and organise the protests. Following the start of demolition work in Gezi Park on 27 May 2013, about fifty environmental activists and local residents occupied the park in an attempt to prevent its destruction. The protest movements were initially led by ecologists and local residents objecting to the destruction of the park. On 31 May 2013, however, the police intervened violently to remove the persons occupying the park. There were confrontations between the police and the demonstrators. The protests then escalated in June and July and spread to several towns and cities in Turkey, taking the form of meetings and demonstrations which sometimes led to violent clashes. Overall, four civilians and two police officers were killed, and thousands of people were wounded.

⁴ See *Kavala v Turkey* (ECHR 429 (2019)) at paragraphs 15-16.

An outline of the indictment

11. The indictment was filed by the public prosecutor on 19 February 2019. It accused the defendants of having attempted to overthrow the government by force and violence within the meaning of Article 312 of the Criminal Code⁵, and of having committed numerous breaches of public order – damaging public property, profanation of places of worship and of cemeteries, unlawful possession of dangerous substances, looting, etc.⁶
12. The indictment is made up of three sections.⁷ In the first part, the prosecutor's office set out the context underlying the Gezi events. It specified at the outset that it would present "elements which would show that the Gezi insurrection had been organised by Turkish "distributors" trained by Serbian "exporters" who were professional revolutionaries with financial support from the West".⁸
13. In the second part of the indictment⁹, the prosecutor listed the acts that it accused the defendants of having committed prior to and during the Gezi Park events, and the evidence that it considered relevant. It alleged that the defendants had supported the Gezi insurrection, and that their aims had been to generalise such actions across Anatolia and to popularise so-called "civil disobedience", with the aim of creating generalised chaos in the country. It claimed that this evidence showed that the Open Society Foundation, of which Osman Kavala was a former advisory Board member, had provided financial backing for the Gezi events. It also claimed that Osman Kavala and others organised secret and public meetings with persons who had played an active role in organising those events, and that he had cultivated relationships with several individuals with a view to setting up a media outlet.

⁵ An unofficial translation of this appears here: https://ppp.worldbank.org/public-private-partnership/sites/ppp.worldbank.org/files/ppp_testdumb/documents/040926TurkeyCriminalCode.pdf

⁶ Turkey v Kavala (ECHR 429 (2019) paragraphs 47-48.

⁷ See Turkey v Kavala (ECHR 429 (2019) paragraphs 49-56 for an excellent and detailed summary of the indictment and observations in respect of it.

⁸ Turkey v Kavala (ECHR 429 (2019) paragraph 49.

⁹ Turkey v Kavala (ECHR 429 (2019) paragraph 50.

14. In the third part of the indictment¹⁰, the prosecutor's office referred, in particular, to the evidence that it had gathered in respect of the defendants other than Osman Kavala, included photographs of the symbols used and provided information about them, quoted from articles published during the Gezi events, submitted photographs of the damage caused by acts of vandalism and summarised related events in areas outside of Istanbul.

¹⁰ Turkey v Kavala (ECHR 429 (2019) paragraph 55

PART C: ANALYSIS OF THE INDICTMENT

Executive Summary

15. The fundamental flaws in the indictment in this Gezi have been effectively summarised by the ECtHR in **Kavala v Turkey** (ECtHR 429 (2019)) as follows:

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.

It is important to note, as emphasized above...that the prosecutor's office accused the applicant of leading a criminal association and, in this context, of exploiting numerous civil-society actors and coordinating them in secret, with a view to planning and launching an insurrection against the Government. However, 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...

*224. 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 in such activities and to paralyse civil society in the country.*

16. Further, BHRC concluded the indictment in this case was seriously defective and gravely flawed at an early stage during its trial observations.¹¹

¹¹ BHRC: The "Gezi Park trial forms part of a chilling clampdown on human rights defenders and civil society in Turkey, 17 July 2019, <https://www.barhumanrights.org.uk/bhrc-raises-concern-over-the-the-narrowing-of-an-increasingly-hostile-space-for-human-rights-defenders-in-turkey-following-observation-of-gezi-park-trial-calls-indictment-g/>

17. At the heart of this 657-page indictment is the presumption that the Gezi Park protests were orchestrated by a single person or organisation. There is simply no evidence presented in the indictment to support that presumption, or that that person was any of the defendants. The indictment was described by Mr Kavala as a “fantastic fiction” in his statement to the Court on 24th June 2019. BHRC concurs with this assessment, not least because it frequently appears to tout conspiracy in place of any credible or substantive evidence.
18. In place of a cohesive and well-structured narrative, there is endless repetition, grand political theorising and the expounding of conspiracy theories about Turkey and its role within Europe and the wider world. It is a profoundly *ideological* document and as such is almost impossible for the public to understand or, crucially, one to which the defendants can properly respond.
19. Moreover, the indictment is a document which lacks crucial fairness and balance.
20. Instead the, predominantly political, thesis that runs through the indictment appears to be that;
 - i. The defendants organized the Gezi Park protests as part of an agreement by them to try and overthrow the elected government of Turkey by force;
 - ii. The defendants sought to mask this attempt by pretending that it was really an environmental protest about a park;
 - iii. Whilst the defendants always *expressly* declared support for non-violent protest, they were secretly advancing violent ends;
 - iv. Despite their declared support for and calls for the protest to be non-violent, they were secretly orchestrating those who were carrying out acts of violence at the protests;
 - v. By doing so, the defendants were carrying out the orders or directions from powerful forces outside of Turkey, who were seeking to de-stabilise the country;

- vi. Otherwise perfectly lawful contact between the defendants and NGOs and European bodies was actually part of this secret coordinated plan, directed by forces outside of Turkey.

21. The key factual deficiency in the indictment is not only that it presents such a theory but, despite its length, that it does not ever connect such theories to concrete evidence. Moreover, it does not objectively consider or analyse the volume of evidence that runs contrary to such a thesis. As such, the indictment does not consider or evaluate in a balanced way even the possibility that;

- i. The defendants supported the protests, but only in so far as they involved non-violent means;
- ii. The defendants only ever advocated non-violent means;
- iii. That different members of the public supported the Gezi Park protests for a variety of different reasons and, in doing so, were expressing their own myriad of views, values and concerns rather than simply being followers manipulated by the defendants and/or forces outside of Turkey;
- iv. That the violence at the protests may have been conducted by elements who infiltrated the protests, from various groups with their own aims and agendas, different and separate to those of the defendants;
- v. And/or that the violence used may, to some degree, have been a spontaneous reaction to force used by authorities in seeking to dispel protests;
- vi. That the various meetings and communications, involving the defendants and NGO's and European groups and bodies referred to in the indictment, were part of the everyday lawful business of NGO's and civil society activists.

22. The failure to consider such possibilities renders the indictment wholly lacking in balance. As such, even just for this reason, it is manifestly defective.

23. Further, there are other significant flaws, namely that:

- i. It is highly repetitive; theories are expounded a number of times without explanation as to why they are repeated or, indeed, mentioned at all;
- ii. It is excessive in its length. All though the allegations are complex ones and calling for detailed exposition, there is no need for it to be 657 pages long. The defect is not insignificant; for both the judges evaluating the evidence and the lawyers seeking to test and challenge it, the sheer volume of the indictment would make that task much more difficult;
- iii. Notwithstanding that this is a public prosecution, the indictment lists 773 complainants, including Recep Tayip Erdogan and the entire Turkish cabinet. It is very difficult to ascertain any legitimate legal requirement to include so many plaintiffs. In the absence of any proper reason for this (and none is ascertainable), this appears an overtly political gesture; to seek to present the case as one being brought by the aggrieved masses of Turkish society, who are structurally co-joined with the government in seeking to prosecute the defendants;
- iv. Indeed, the 440th listed complainant is Mevlut Saldogan, a police officer who was convicted of unlawfully killing 19-year-old Gezi protestor Ali İsmail Korkmaz. The portrayal of an officer convicted of unlawfully killing a protestor as an 'aggrieved' party in an indictment is hard to countenance in a democratic society. Indeed, Saldogan had already been sentenced to 10 years imprisonment for the killing *before* the indictment had been presented.

24. Further and crucially there are elemental legal flaws in the indictment in terms of its lack of adherence to international human rights law, particularly in its approach towards peaceful and lawful activity in relation to the rights of freedom of association and expression, rights essential to the preservation of a democratic society. This is explored further below.

Evaluation of the indictment in terms of Turkish Laws

25. The indictment is evaluated in this report by reference to Article 170 of the Turkish Criminal Procedure Code, which concerns the duty of filing a public prosecution:

Article 170

1. The duty to file a public prosecution rests with the public prosecutor.
 2. In cases where, at the end of the investigation phase, collected evidence constitutes sufficient suspicion that a crime has been committed, then the public prosecutor shall prepare an indictment.
 3. The indictment, addressed to the court that has subject matter jurisdiction and venue, shall contain:
 - a. The identity of the suspect,
 - b. His defence counsel,
 - c. Identity of the murdered person, victim or the injured party,
 - d. The representative or legal representative of the victim or the injured party,
 - e. In cases, where there is no danger of disclosure, the identity of the informant,
 - f. The identity of the claimant,
 - g. The date that the claim had been put forward,
 - h. The crime charged and the related Articles of applicable Criminal Code,
 - i. Place, date and the time period of the charged crime,
 - j. Evidence of the offence,
 - k. Explanation of whether the suspect is in detention or not, and if he is arrested with a warrant, the date he was taken into custody and the date of his arrest with a warrant, and their duration.
 4. The events that comprise the charged crime shall be explained in the indictment in accordance to their relationship to the present evidence.
 5. The conclusion section of the indictment shall include not only the issues that are unfavourable to the suspect, but also issues in his favour.
 6. At the conclusion section of the indictment, the following issues shall be clearly stated: which punishment and measure of security as foreseen by the related Law is being requested to be inflicted at the end of the adjudication; in cases where the crime has been committed within the activities of a legal entity, the measure of security to be imposed upon that legal entity.
26. This report considers firstly the *formal* aspects of the indictment and whether the indictment conforms to these formalities. It then considers the key qualitative requirements of the indictment, as set out under Article 170(4) and (5), namely

whether the charges are properly explained in the indictment and whether the document has the required balance.

Article 170 (2) – Is there enough evidence constituting sufficient suspicion that a crime has been committed prior to filing the indictment?

27. It is worth noting at the outset, however, in respect of 170(2) and the requirement that the before an indictment is filed there is evidence constituting sufficient suspicion that a crime has been committed, the ECtHR came to the clear view that there was no evidence that gave rise, in good faith, to a reasonable suspicion that an offence had been committed.¹²
28. As such the indictment is arguably legally defective as a whole, in that the investigation had not uncovered sufficient evidence that a crime had been committed and that, therefore, it was a breach of Article 170(2) to file such an indictment. In short, this was an indictment that should never have been filed because there was no evidence that, in good faith, could support it.
29. Although this is a fundamental aspect, the primary purpose of this report is not to comment on the *weight* of the evidence, or lack of it. There are two reasons for this. Firstly, this issue has already been resolved. Both the ECtHR and the judges of the Gezi Park trial came to the view that the evidence gathered did not support the allegation charged. Secondly, the analysis in this report focuses upon the other aspects of the indictment; whether it conforms with legal formalities, clearly sets out and explains the evidence on which charges are brought and is presents the evidence in a balanced way. It further sets out a summary and analysis of the international law standards applicable.

¹² Turkey v Kavala (ECHR 429 (2019) at paragraph 153

Article 170 (3) – Does the indictment comply with the formalities required?

30. The indictment conforms with the requirements under Article 170 in respect of a number of formalities. It clearly sets out the identity of the suspects. It does not detail who the defence lawyers representing the suspects are, but no criticism is made of this as it may not have been known by that point who were representing the defendants. The indictment does, however, clearly set out the remand status of the defendants as required, indicating when they were arrested and/or detained.
31. The indictment also sets out the names of over 700 'injured parties' or complainants, although it does not set out in respect of *all* of these people who they are and/or how they have been injured.¹³ A number of plaintiffs are listed as such but without explanation in the indictment as to nature of their injury. The same can also be said for the 27 names of the members of the Turkish cabinet named as aggrieved parties. What, for instance, the defendants and/or the Gezi Park protests had to do with Veysel Eroglu, the 61st Government Minister of Forestry and Water Works, is not explained in the indictment.
32. Regarding identities of informants, there are three references in the indictment to informants¹⁴, but no names are provided. Again, no criticism is made of this as there may be legitimate law enforcement reasons why the identities of these informants are not revealed. Indeed, at section 2.1.9.1. a person Murat Papuç is referred to as having provided information in a role akin to that of an informant. Although this individual was to become a controversial figure in the trial and subject to adverse comment by the ECtHR¹⁵, he is correctly named here in the indictment, in accordance with 170(3)(e).

¹³ See Paragraph 3 above for comments about the excessive number of complainants and the inclusion as complainant of a convicted killer of a protestor.

¹⁴ At section 2.1.4. regarding Mine Özerden's links to the Open Society Foundation, at section 2.1.9.3 regarding information received which the indictment suggests indicates that the pharmaceutical firms Biofarma had supported the protests and at 3.1. concerning the identity of an individual shown on photographs.

¹⁵ Turkey v Kavala (ECHR 429 (2019) paragraph 227.

33. The crime charged here, being under Article 312/1 of the Turkish Criminal Code and ancillary offences, is set out in the introductory section. The indictment does not, however, set out the various elements of an offence under Article 312/1, nor what is required to be proved and/or any applicable statutory defences to the charge. In the context of this indictment, this is not merely a formal defect; setting out clearly the elements of the offence and what must be proved is an effective and reliable way for a prosecutor to consider and/or check for him or herself whether all aspects of a charge can be proved and/or whether certain defences may apply.
34. The indictment refers to various other Articles under the Turkish Criminal Code which it says are applicable, but does not set out how they are applicable. It also does set out the date of the crime alleged as 'before 2014'. This could be said to be vague and lack particularity but it is perhaps explained by the fact that the Gezi protests took place on a number of different dates during the course of 2013.
35. It follows that there is only limited adverse comment in relation to these basic formalities in the Gezi indictment. In general, it conforms with the Code in this respect.

Article 170 (4) – Does the indictment properly explain the crime alleged and the evidence establishing the offence?

36. In this respect, the indictment is seriously defective. There are different aspects of concern, which are here broken down into different headings as follows:

A political indictment

37. The indictment presents a number of grand political (conspiracy) theories which appear to have replaced any objective, forensic and legal analysis of the evidence. It should be acknowledged that the subject matter of the indictment is to a degree political, involving an allegation of an attempt to overthrow the political order by force. Therefore, it is at least understandable that the indictment would make reference to political institutions and instruments of government.

38. In such a case, however, it is even more important to forensically examine the evidence and present it in a clear way, free of political ideology and animus. If the evidence supports such a charge, it should be possible to present it in a clear and concrete way. Here, however, we have the opposite; conspiracy theory appears to have substituted itself for evidence. For practical purposes, this report considers only a few examples of the very many amidst the 640 or so pages of the (translated) indictment.

39. One such example can be found in the introduction section (Page 24/640), which makes comments about the Arab Spring:

"The Arab Spring is a movement with major political consequences that occurred in the Arab world. This is a common name given to a public movement in the Arab regions that started in 2010 and still continues at the present. The Arab spring emerged from the democracy, freedom and human rights demands of the Arab people; it is a regional, societal, political and armed movement. Protests, meetings, demonstrations and internal conflicts took place. The people overtook governments in the name of freedom... In our country, as a different reflection and adaptation of this events, the suspects, about whom the indictment has been prepared, used the protests against the transferring of some trees in the Taksim Gezi Park within the scope of the Istanbul Taksim Region Pedestrian Area Creation project on 27.05.2013 to turn the event into violent demonstrations throughout the country and an attempt against the government through provocation."

40. Another passage (25/640) is typical, suggesting that the aim of the defendants and the protests was to bring down the elected government, but without indicating the evidence which supports this thesis:

"It has been determined based on the evidence obtained in the investigation and the events that have occurred throughout the country in general that these actions did not occur randomly, they were conducted with organization in a systematic and planned manner, that despite being portrayed as democratic rights and innocent protests, they actually aimed to create chaos and disorder throughout the country and remove the Republic of Turkey government or prevent it from carrying out its duties by these means with the intention of launching an armed revolt against the Republic of Turkey Government."

41. The indictment frequently advances the, highly political, theory that the Gezi Park protests were orchestrated by international powers but without indicating the evidence to support this. For instance, one passage (26/640) reads:

“The fact that Gezi Park Demonstrations (Attempts) process matches exactly the events that occurred in Eastern Block and Arab countries where civil conflicts led to revolutions shows that the events that occurred in our country were orchestrated with the support of international entities.”

42. Elsewhere the political theories of unnamed others are presented as facts. One such passage (26/640) reads:

“The influence of SOROS on the Gezi Attempt was greatly discussed both in the press and in political and academic circles, therefore it is clear that George SOROS, the founder of the Open Society Institute, was influential in the Gezi Attempt that occurred in our country, just like he was in the other countries where uprisings took place.”

43. In numerous instances, the indictment contains references to a global conspiracy on a grand scale. At (91/640) the indictment reads:

“This has been stated by Government members and a variety of people and organizations through the press and also in the statement of Can PAKER, a former chairman of the Open Society Foundation who used to be a member but later departed from the foundation, as follows; “George SOROS, President of the Open Society Foundation, forces the foundation to act according to Israeli policies because he is Jewish and has also pushed opposition against the AK Parti government during the Turkey-Israeli crisis” clearly show the influence and guidance of the Open Society Foundation in these events.”

44. The relevance of George Soros being Jewish, nor the influence of Israel on these events, is entirely unexplained. No evidence is presented in support of such a theory. Perhaps more crucially how is the court supposed to evaluate this point and how are the defence able to challenge it. On its face, it is another example of baseless – and inherently prejudicial and discriminatory - political theory.

45. By way of further example, it is consistently advanced that the Gezi protests were organised by 'global capital' to undermine Turkey. At (89/640) the indictment reads:

"It is understood from this that the forces behind OTPOR or its derivatives that rule global capital, are making attempts towards governments that do not accept the political maps of regions like the Middle East that do not think like them, that do not serve their bidding or what they are trying to force on the countries of the world; and that the objective of these forces is not to establish democratic governments."

46. Further, at (89/640), the indictment continues:

"It is obvious that these forces are hypocritical in severe police response to demonstrations in countries that are locomotive powers like Europe and America, where they are trying to branch out in a similar way because when it comes to Islamic regions or countries against globalization, they exaggerate the events through the media and supposed democratic leaders who make themselves heard and try to work the situation to suit their own political purposes. The events surrounding the Gezi attempt must also be considered within this global ideology that has been explained above and to a certain extent the demonstrations were successful and it appears that the objective was to wear down the Justice and Development Party and the Prime Minister of the Republic of Turkey, Recep Tayyip ERDOĞAN in particular."

47. Once again it is unclear how a court is in a position to evaluate such a political proposition or how the defence could be said to be able challenge it. Instead, such comments provide evidence that this indictment proposes a political rather than legal-criminal trial and was advanced, as the ECtHR concluded, for political purposes.

48. Further passages of the indictment suggest the Gezi events are, somehow, connected to a global bid to suppress Turkey's bid to host the Olympic games (272/640):

"IMAGES IN FOREIGN MEDIA

As observed, foreign press publications sent their reporters to our country to cover the uprising. Their reports made headlines due to their exaggerated nature. To prevent our country from hosting the 2020 Olympics, they ran smear campaigns in social media by distributing handouts and pasting flyers around about the events in various countries."

49. Once again, on page 89/640, one of many passages which, without explanation, are set out in capitals. This seeks to portray the Gezi events as part of a global conspiracy:

"IN LIGHT OF THIS INFORMATION IT IS APPARENT THAT THE GEZI ATTEMPT WAS GUIDED AND ENCOURAGED BY STRUCTURES WITH GLOBAL GOALS THAT COULD DISSOLVE ARMED TERRORIST ORGANIZATIONS AND LEGAL AND LEGAL APPEARING ILLEGAL ENTITIES WITHIN THEIR STRUCTURE AND TAKE CONTROL OF THEM, ANALYZE THE SOCIAL FORM VERY WELL AND INFLUENCE THE PUBLIC IN LINE WITH THE PERCEPTION THEY CREATED. IT IS APPARENT THAT THE GEZI ATTEMPTS WERE ACTIONS ORGANIZED IN THE WAY WE HAVE TRIED TO EXPLAIN, ORCHESTRATED BY THE SUSPECTS IN THE INDICTMENT AND PRESENTED ON STAGE. THE FACT THAT THESE INCIDENTS ARE NOT EXPERIENCED IN MANY COUNTRIES OF THE WORLD IN THE EXISTING POLITICAL STRUCTURE THAT ARE GOVERNED BY ANTI DEMOCRATIC METHODS OR KINGDOMS BUT ARE CONSIDERED THEIR ALLIES OR STRATEGIC PARTNERS SUPPORTS THIS THESIS."

50. It cannot be overlooked that such comments are likely to have a profound effect on the fairness of the subsequent proceedings. When an indictment is so firmly rooted to the political ideology of a ruling political party, for the judges under a duty to evaluate it, any rejection of such an indictment through acquittals becomes a perilous course, tantamount to a repudiation of this ideology. Indeed, it is of grave concern that the judges who acquitted the Gezi Park defendants in February 2020 were immediately put under investigation following the verdicts. The acquittals were later described by the President of Turkey as a 'maneuver', which clearly reflects the real dangers of loading an indictment with political ideology.

51. Another adverse effect of this political theorising is that it obscures any proper objective analysis of the evidence, because to do so would represent doubt or criticism of the ideology.

52. For all the reasons above, the indictment reads more like a blunt attempt to silence any opposition within Turkish civil society. Such an indictment, and its pursuit by prosecutors, is not consistent with a plural democracy where the rule of law is observed.

Lack of clarity and coherence

53. Another key failing is the lack of clarity and coherence in this indictment which renders it almost impossible for the defendants to properly understand and challenge the case against them and as such to have a fair trial.

54. In particular, there are a number of rambling and unexplained comments that litter this indictment and appear to be wholly unconnected or relevant to any of the charges. The following passage from the introduction section (page 24/640) is typical. It concerns a record of conversation between two suspects:

For the purposes of explaining the gravity of the actions that are the subject of our indictment, which was a movement started in 2011 and attempted to be placed on stage in May of 2013 referred to as the Gezi Park events by the public but was actually an action of attempt; we will explain how in a telephone conversation between the suspects Mehmet Osman KAVALA and MEMET ALİ ALABORA (ID: 2189170193) Mehmet Osman KAVALA said "...THE EUROPEANS ARE ASKING AT EVERYTHING I SEE THAT'S ALL FINE AND WELL BUT HOW WILL THIS CHANGE THE POLITICAL SITUATION..." and also Memet Ali ALABORA said on the social media "THE ISSUE IS NOT JUST GEZI PARK MY FRIEND, HAVE YOU STILL NOT UNDERSTOOD THIS" indicating both suspects were functioning as INFLUENCERS posting provocative shares.

55. The significance of the such an ordinary conversation asking how the protests may affect the political situation, at least on its face, is nowhere explained, nor shown how this is connected to a social media post made by one of them. The connection, if any at all, is simply not made.

56. It is a common feature of this indictment that broad, and unsubstantiated comments and accusations are made, without any evidence in support. For instance, there is comment (31/640) about trips made by Osman Kavalá and the suggestion that these were for the purpose of organising the protests with foreign entities, but entirely unevicenced, over and above the fact that he went to those places. On the face of it, therefore, ordinary lawful travel is criminalised, without any explanation:

"Therefore, it has been determined that the group was receiving training on civil uprising from OTPOR director Ivan MAROVIĆ while they were in Cairo while Mehmet Osman KAVALA was travelling as mentioned in Belgium, Germany and the United States to coordinate another aspect of the attempt.

57. In the same vein, comment is made (38/640) to the effect that Osman Kavala visited Hungary and that George Soros is active in that country, to suggest that this provides evidence that the trip to Hungary was for the purpose of some criminal activity involving him and George Soros, but without providing any evidence over and above the fact of the trip. Thus the act of travelling to a country is, without explanation, criminalised:

"Mehmet Osman KAVALA went to Hungary between 05.04.2012-06.04.2013... and it was understood that this trip happened right before the Gezi protests, that the founder of the Open Society Foundation, George SOROS is very active in this country, and had to move the foundation university in this country to another country due to similar allegations during the preparation of the case file and it was understood that the suspects' travel was a coordination trip for the Gezi protests.

58. The flight records of various defendants and other named individuals are reported on, but without any attempt to explain the relevance of the trips. The following (37/640) is typical:

"Mehmet Osman KAVALA went to France between 15.11.2012-18.11.2012, Mehmet Osman Kavala traveled to France on flight number TK1823 on 15.11.2012, and suspect named Meltem Aslan Çelikkan (TC: 19489865864) who had a decision of separation of the case also traveled to France on the same plane."

59. Either the travel to France is linked by evidence to the Gezi Park protests, in which case this should be provided for in the Indictment, or it is not, in which case it should not be included.

60. One section of the indictment seeks to demonstrate similarities between 198 methods of non-violent protest described by an American academic Gene Sharp in a book and the Gezi Park protests, in order to show how the events were part of a pre-ordained play book. Leaving to one side that the author of the Indictment seems at no point to have reflected on the very significant irony, in the context of the charge under Article 312, that these were forms of non-violent protest, this leads to a number of bizarre passages in the indictment. One of the 198 forms of non-violent protest involves staying at home and, in this light, the author presents the evidence of one defendant (54/640) staying at home during the Gezi Park protests as evidence of his participation in them:

"WITHDRAWAL FROM THE SOCIAL SYSTEM

Staying at Home (Many people, mainly Mehmet Ali ALABORA...did not leave the house for a while during these events.)"

61. Other items on the list of 198 forms of non-violent protest are merely listed but without any explanation of how they occurred during or relate to the Gezi Park protests:

"LIMITED STRIKES

108.Detailed Strike

109.Buffer Strike

110.Slowdown Strike

111. Slowdown of Work by Abiding by the Rules

112. Not Going to Work by Taking a Sick Report

113. Resignation Strike

114.Limited Strike

115.Selective Strike

MULTIPLE-INDUSTRIAL"

62. Other forms on the list of 198 are commented on in a selective way. For instance, in a section on 'symbolic sounds' comment is made about people going onto balconies at 9pm to make sounds with kitchenware in support, but without mentioning that this is a form of protest that has been used historically in Turkey for a number of years (51/640):

"28. Symbolic Sounds

(From the first day of the events until the last, in many regions of the country, particularly our city, people went out to their balconies around 9 pm, and made noises with their kitchenware to support Gezi protests.)"

63. In this section, fairly banal comparisons are included as somehow relevant. For instance, one of the 198 forms concerns support of the protests by musicians. The following is included:

"36. Plays and Music Events (Many music bands such as Kardeş Türküler and Duman composed songs, Roger Waters' "The Wall" concert tour displayed the photos of people who died in Istanbul during the riots.)"

64. Logical questions immediately arise: How are Roger Waters actions on his concert tour reasonably capable of providing support for the thesis that these

defendants were involved in an attempt to overthrow the Turkish Government by force? It is difficult even to countenance that the public prosecutor sought aggravated life sentences on the basis of such allegations contained within this indictment. That individuals have spent considerable time in detention on the basis of it is unsupportable.

65. The lack of balance and reflection in such comments is telling. Having considered all 198 forms of non-violent protest, without indicating how a large number of them apply to Turkey and Gezi Park, the following comment is made in the indictment:

"All of the 198 Passive Action Methods stated in GENE SHARP's "From Dictatorship to Democracy" book were used in different ways in the Gezi Uprising in our country."

66. Nowhere is there comment or reflection in the indictment that any similarities between the Gezi protests and a handbook for *non-violent* protest, might actually be an indication that the primary aims of the protests were non-violent.

67. In some parts, records of conversations between defendants are referred to but with no reference to their date in order to understand their context or meaning, whether they are before, during or after the Gezi events. This (94/640) is typical:

"Also in the phone call between MEMET ALİ ALABORA and MEHMET OSMAN KAVALA on this subject (ID: 2189170193) Mehmet Osman KAVALA was detected a saying "AT SOME POINT LIKE ABOUT WHAT THIS EVENT IS GOING TO LEAD TO IN THE FUTURE, LIKE THESE EUROPEANS KEEP SAYING FOR EVERYTHING I SEE THAT'S ALL WELL AND GOOD BUT HOW WILL THIS CHANGE THE POLITICAL SITUATION THEY KEEP ASKING. SHOULD WE AT SOME POINT, A FEW FRIENDS, SIT DOWN AND TALK ABOUT THIS?"

68. The context of these comments is entirely unclear and incapable of logical evaluation. Equally, it is entirely unclear how passages like this are claimed to provide any support for violent purposes.

69. There are a large number of comments in the indictment which are made unsupported by or connected to any evidence (94/640):

"When considered with all the collected evidence it is apparent that the suspects were in contact with each other, that there were relations based on a hierarchy, although loose, and delegation of duties between them."

70. A great number of portions of the Indictment appear to lack any rational or relevant connection to the apparent charges. In one example(97/640), significance is given to a 2005 newspaper article where Osman Kavala is referred to as the "Turkish Soros." This is, somehow, considered relevant:

"An Interesting Portrait: "Turkish Soros" who met with the Prime Minister: Osman Kavala: There was someone with "businessman" in his title among the delegation that met with the Prime Minister last Wednesday: Osman Kavala. Among journalists, authors, poets and intellectuals – a 'businessman' was searching for contact with the Prime Minister concerning the 'Kurdish Problem'...Osman Kavala was probably a businessman with intellectual aspirations!"

71. The indictment frequently refers to meetings involving the defendants and various individuals or groups outside of Turkey. The relevance of these meetings and how they indicate support for violent means is never explained. This passage (148/640), concerning meetings months after the Gezi Park events, is typical:

"Based on Communication ID: 2453774465 on 22.11.2013 at 15:58, in which MEHMET OSMAN KAVALA (905322221xxx) called ASENA GÜNAL (905336859xxx), the text read: "Asena hi, there is a possibility that the socialist group leader Swobodan from the European Parliament might come to the exhibition. This may be either at 19.30 or 21.30-22.00. It will become clear at 19:00. I'll call you. How is your part doing?"

72. Another theme within the Indictment is the suggestion that certain pronouncements made by the defendants are false or represent disinformation, but without providing the evidence that they are false. Consider this passage (178/640):

"It was determined that, after the start of the riots, the members of Taksim Solidarity were engaged in significant disinformation using written, visual and social media with statements such as "they are declaring a state of siege", "intensive gas and water sprayed with (anti-riot) water cannon vehicles"...that they shared many fake news on purpose, that they were engaged in provocative activities, abusing the sensitivity of the public, thus provoking the public to participate in illegal acts and protests against the Security forces."

73. Additionally, the Indictment seeks to make a connection between the Gezi Park protests and the attempted coup three years later in 2016 (230/640). How this is relevant to the defendants is left entirely unclear and, consequently, would be impossible for the defence to challenge or the court to evaluate:

“In the light of this information, one can conclude that, at the time, with the Gezi uprising intending to spread across the country as far as possible, the armed terrorist organization FETÖ/PDY saw the uprising as an opportunity for itself. In the event that such uprising should succeed, resulting in the resignation of the government or early elections, the organization hoped to benefit from such a result. Shortly after the Gezi Park protests failed and no such uprising was expected to repeat itself as an uprising with sympathetic coverage as the Gezi Park events, aiming at the government, the organization, which considered the government of the Republic of Turkey a danger to itself, initiated a judicial coup against it on 17-25 December along with the conspiracy investigations. Afterwards, hoping to prevent reelection/re-nomination of the current President of the Republic of Turkey Recep Tayyip Erdoğan, who acted as Prime Minister at the time, just as it has been achieved by the same formation abroad, on 15 July 2016, when they made an attempt against his life, the organization frustrated any effective, proportional, and appropriate interventions in the uprising viewed sympathetically as the Gezi Park events through its cells within the security circles. Otherwise, if needed, it intervened inappropriately and disproportionately to draw the society's justified reaction and to incite with the intention of setting ground for creating the perception of this group's victimization. Thus, in terms of their ambitions, the armed terrorist organization FETÖ/PDY hoped to pacify the current President of the Republic of Turkey Recep Tayyip Erdoğan, who acted as Prime Minister at the time and whom the organization viewed as their main obstacle, and then to take over the government by means of its militants, sadly present in almost every office of the government. As this attempt failed, the organization decided to take the stage by itself, first as the 17-25 December coup attempt and then as the second 15 July 2016 attempt.”

74. The indictment reaches, at points, the furthestmost boundaries of irrelevance. At page (289/640) the indictment refers to an image of a map found on Osman Kavala's mobile phone as follows:

“In the examination of the suspect's mobile phone: there has been obtained a photograph taken by the suspect's mobile phone on 27/02/2016, depicting the borders of the Republic of Turkey that were redrawn, thereby breaking its integrity.”

75. Once again, it is not possible to identify or understand the point being made in this passage of the indictment and accordingly to challenge it.
76. The cumulative effect of these, and many similar passages, is that it is almost impossible to find or evaluate any coherent or logical evidence that actually

supports the charges. Indeed, when you look underneath the political theorising, unsubstantiated and irrelevant points, the repetition and the verbiage, there is a total lack of concrete evidence to connect the defendants to a charge that they attempted to overthrow a government by violent means.

77. There are a number of possible explanations for the inclusion of all this irrelevant material. Either the author or authors of the indictment got so carried away with the political theorising, and their belief in the soundness of the political ideologies underpinning it, that they failed to properly and objectively analyse the evidence gathered, or the endless repetition and inclusion of irrelevant material is actually a deliberate attempt at obfuscating and masking the lack of any cogent evidence. Either way, it is clear that Turkey has failed to comply with proper legal prosecutorial standards in the preparation and formulation of the indictment in this case.

Article 170 (5) – Does the indictment properly balance evidence both favourable to and unfavourable to the defendants?

78. This Article requires the indictment to have balance and to weigh points both favourable and unfavourable to the suspects. This is no more than to reflect the general norms as set out in Principles 13(a) and 13(b) of the Basic Principles on the Role of Prosecutors and Article 3 of the Standards of the International Association of Prosecutors. Article 3 states that:

“Impartiality

Prosecutors shall perform their duties without fear, favour or prejudice. In particular they shall:

- 3.1 carry out their functions impartially;
- 3.2 remain unaffected by individual or sectional interests and public or media pressures and shall have regard only to the public interest;
- 3.3 act with objectivity;
- 3.4 have regard to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect;”

79. Unfortunately, such balance is nowhere to be found in this indictment.

80. There are a number of aspects to the evidence that require comment and evaluation in the indictment in order for there to be due balance, aspects which are entirely absent here. They include:

- i. None of the many comments made by the defendants referred to in the indictment indicate any support for violent means of protest. This point is of profound significance as the sources of the indictment include intercepted communications involving the defendants and emails between them and others. If, despite all of this, not a single comment (public and private) is found where support for violence is indicated, this would be an important matter to be made clear in the indictment and would require careful rebuttal;
- ii. On the contrary, there are a very large number of comments (public or private) referred to in the indictment that indicate support for purely non-violent means of protest. This is neither acknowledged nor commented on;
- iii. Likewise, the significance of any similarities between the Gezi protests and a book espousing 198 forms of *non-violent* protest is not evaluated or commented on in the context of an allegation under Article 312 of the Turkish Penal Code;
- iv. There is nowhere to be found any evaluation of the possibility that acts of violence committed by some at the Gezi Protests were actually carried out by groups not in any way associated to the defendants and/or their civil society groups;
- v. There is nowhere to be found any evaluation of the possibility that different people took part in or supported the Gezi Park protests for many different reasons, including the defendants;
- vi. There is no balanced evaluation of the possibility that various trips abroad were in support of legitimate activities, indeed the contrary assumption is made;
- vii. Much is made of attempts to purchase or obtain gas masks during the protests but there is no evaluation as to whether this was actually a defensive measure as protestors were being tear gassed, consistent with human rights activism. On the contrary, it is presumed in the indictment that this is an indication of support for violence;
- viii. There is no balanced assessment of whether meetings with European civil rights groups and parliamentarians were in pursuit of lawful aims and/or legitimate lawful criticisms of the Turkish Government and its handling of the

Gezi Park protests. On the contrary, this activity is cast within a presumption that this is all in pursuit of a global criminal conspiracy. Within this framework, all criticism is criminalised;

- ix. Much is made of an attempt to make a video, after the events, about the Gezi Park protests after the event but there is no balanced assessment as to whether this is part of legitimate lawful criticism of the government and the exercise of rights of freedom of expression;
- x. The indictment suggests that the defendants all acted together as part of a group with defined agreed aims with an informal hierarchy, but the indictment never balances this an analysis of the possibility that different defendants had different motives, nor comments on the lack of evidence to suggest that they were a concrete group;
- xi. The activities of certain NGOs and civil society groups are all cast within a framework that presumes them to be involved in illegitimate criminal activity. Neither the contrary possibility, that these were legitimate lawful groups conducting ordinary civil society activism, nor the lack of evidence that they were involved in criminal activity, is ever commented on;
- xii. No assessment or comment is made about some defendants having already been acquitted on previous charges relating to the Gezi Park events;
- xiii. No assessment or comment is made to the effect that none of the defendants are ever seen to be involved in acts of violence or present at the protests and inciting them.

81. This profound lack of balance runs through the 640 pages of the (translated) indictment. As such, it is impossible to illustrate all the examples of this within the framework of this report. The following represent, therefore, merely a couple of examples of very many and are indicative of the predominant approach that runs throughout the indictment:

82. One passage contains a recording of a conversation involving two defendants where they discuss engagement with Human Rights bodies in relation to an embargo regarding the use of gas canisters (122/640):

“MEHMET OSMAN KAVALA (90532xxx xxxx) called YİĞİT ALİ EKMEKÇİ(90532xxx xxxx) said, “Okay I'll say something, I mean it's a little inappropriate, but would you like to meet with the Human Rights Commissary arrives... the first week of July,” Mehmet Osman said “of course I'd be happy to... We're making preparations for a

request for the embargo of gas exports to Turkey unless the State doesn't change the methods for using gas."

83. This is taken, somehow, as indicative of support for violent means but there is no analysis or evaluation on the fact that this may be legitimate and lawful civil rights advocacy in connection with human rights groups to limit the use of CS gas. Consistent with the slightly *fevered* approach of the authors of the indictment, the contrary is assumed, without any supporting evidence.

84. In a similar vein, a passage refers to a video being produced about the Gezi Park protests in conjunction with a film festival but without, for some reason, any date attached. This is presented as evidence of criminal intent rather than a legitimate exercise of making a documentary as part of the ordinary rights of freedom of expression, and despite seemingly taking place after the protests:

"Çiğdem Mater UTKU, a person working at Anadolu Kültür A.Ş. connected with the Open Society Foundation, which was under the direction of suspect Mehmet Osman KAVALA. In the phone call with ID: 2223204847 and ID: 2223229208 she states that they have talked to Rada SEZİÇ (film producer) from Sarajevo with Mehmet Osman KAVALA about a 15 minute film called VIDEO İŞGAL (VIDEO OCCUPY) concerning the filming of Gezi events and documentaries; that this conversation took place at the Erivan film festival, that these types of work by the Open Society Foundation were funded through Anadolu Kültür A.Ş., that the 15 minute film about GEZI called VIDEO OCCUPY was taken and shown accompanied by Osman KAVALA."

85. It is plain that this very lengthy indictment does not engage with any evidence that runs contrary to its central political thesis. Most significantly, it refuses to engage with the evidence that none of the defendants are ever recorded to have called for or expressed support for violence. Neither does it engage with the *preponderance* of evidence where defendants expressly support (in public or private conversation) non-violent means.

86. Other instances in the indictment reveal a sheer lack of fairness and objectivity. As reported on above, one of the plaintiffs was a police officer who was convicted of the unlawful killing of a protestor. This is entirely covered up in a passage (87/640) concerning the killing of the student. The part in bold font is for emphasis:

“July 10 2013: An individual named Ali İsmail Korkmaz, a student of the Eskişehir Anadolu Lisesi, ran to a back road with a group of demonstrators to escape the response by the police with water cannon and pepper spray on June 2, 2013 where he was attacked by 5-6 people in civilian clothes. After being treated in Mavi Hastanesi he was sent to Yunus Emre Devlet Hastanesi. Here he was sent home after a tomography was taken. After collapsing at home Korkmaz was taken to Eskişehir Devlet Hastanesi where it was determined that he had bleeding in his brain. Korkmaz was kept in the intensive care ward hooked up to a ventilator. Korkmaz died around noon on July 10, 2013.”

87. Overall, there is a total lack of balance and fairness in the indictment. Again, there are two possibilities; either the authors of the indictment were so carried away with the grand political thesis that they were unable to objectively assess their own evidence and/or it was not an indictment drafted in good faith.

88. Certainly, the ECtHR ruled that the evidence in the indictment could not, in good faith, provide a reasonable suspicion of an offence:

“However, 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.”

89. Resolving these two possibilities goes outside of the scope of this report but, suffice to say, the complete lack of balance in the indictment is such that it hardly resembles a legal document at all. Indeed, given the consequences of filing an indictment such as this, it represents a profound abuse of state prosecutorial power.

Evaluation of the indictment in terms of international standards

90. In addition to failing to comply with the Turkish Code for indictments, the indictment is also profoundly at odds with rights enshrined within the ECHR and the International Covenant on Civil and Political Rights ("ICCPR") to which Turkey is a signatory. What follows is necessarily only a summary of the international law principles which apply. More detailed exposition of these principles can be found set out in, for example, other BHRC reports which consider many of the same failings within the context of trials observed by BHRC.¹⁶

Right to a fair trial

91. The right to a fair trial is protected in both Articles 5 and 6 of the ECHR and Articles 9 and 14 of the International Covenant of Civil and Political Rights ("ICCPR") to which both Turkey is a signatory.¹⁷

92. A fundamental component of the right to a fair trial is the right of a Defendant to know the case against him/her and to challenge it. International human rights law is clear that if a defendant does not know the nature of the case against him, he is unlikely to be able to properly instruct his lawyer, obtain relevant evidence to support his defence or properly prepare for his defence.¹⁸ He is therefore highly unlikely to be able to have a fair trial. He is also unable to challenge his detention.¹⁹

93. General Comment 32 of the United Nations Human Rights Committee, dated 23 August 2017 (CCPR/C/GC/32) provides clearly at paragraph 31 that this right includes being provided with "both the law and the alleged general facts on which the charge is based."

¹⁶ See BHRC, Trial Observation Interim Report, ZamanNewspaper: Journalists on trial, June 2018, available at <http://www.barhumanrights.org.uk/wp-content/uploads/2018/07/Zaman-TRIAL-OBSERVATION-INTERIM-REPORT-FINAL-1-1.pdf>

¹⁷ Turkey ratified the ECHR in 1954 and the ICCPR in 2003.

¹⁸ *Mattoccia v Italy*, App. no. 23969/94 (judgment 25th July 2000) (ECtHR), para 60.

¹⁹ *Fox, Campbell and Hartley v UK*, App. nos. 12244/86; 12245/86; 12383/86 (judgment 30th August 1990) (ECtHR); (1991) 13 EHRR, paragraph 40

94. Furthermore, established case law of the ECtHR affirms that it is a fundamental aspect of a fair trial that proceedings be adversarial with equality of arms between the prosecution and defence. The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party.²⁰
95. In this case the lack of clarity and coherence, and the failure of the indictment to disclose any real evidence unnecessary repetition and unexplained theory and comments in the indictment is such as to render it incapable of proper objective analysis or response and accordingly is an indictment which, in every respect, violates articles 6 and 14 of the ECHR and ICCPR respectively.
96. Likewise, the right to a fair trial protects the cardinal principle of the “presumption of innocence.” In this case, a considerable amount of material in indictment describes activity which is on the face of it lawful activity (making trips abroad, meeting with individuals from both Turkey and abroad, private telephone communications, work within ordinary lawful civil society groups etc.) but which in the indictment is presumed, without any or any concrete evidence to the contrary, to be criminal activity.
97. Of course trips abroad, etc., can be in pursuit of criminal ends but this needs to be clearly indicated by concrete evidence, which is wholly lacking in this indictment.
98. As such the whole premise of the Indictment runs contrary to the presumption of innocence enshrined within the right to fair trial in Articles 6 and 14 as above. It further fails to meet the minimum guarantees within those provision as to the information to which a Defendant is entitled in responding to a criminal charge

²⁰ *Natunen v Finland*, App. no. 21022/04 (judgment 31st March 2009) (ECtHR); (2009) 49 EHRR 810, paragraph 39, citing *Rowe and Davis v UK*, App. no. 28901/95 (judgment 16th February 2000) (ECtHR); (2000) 30 EHRR 1 and cases therein.

against him to such an extent that a fair trial on this indictment is simply impossible.

Freedom of expression and association

99. Of further concern in the context of this indictment is that it appears to fundamentally undermine the rights of freedom of expression and freedom of association as enshrined in Articles 10 and 11 of the ECHR and as enshrined in 19 and 21 of the ICCPR. The indictment fails to consider, balance or evaluate any of these rights in the context of the evidence and allegations.

100. Nearly all, if not all, of the activity of the defendants as described in the indictment was *prima facie* lawful activity protected by these rights (performing a play, producing a documentary video, human rights activism, commenting on government policy, meeting with parliamentarians from the European parliament, going on trips abroad, working in and running open society groups, etc.). In most instances where such activity is detailed in the indictment, it is done without reference to any concrete evidence that such activity was in pursuit of criminal purposes.

101. On the contrary, in the indictment the exercise by these defendants in these basic rights was wholly criminalised and *presumed* to be criminal. Within such a framework, all opposition to the development of the park, the handling by the Gezi Park protests by the authorities and all criticism of the government is cast as being part of some overall plot to overtake Turkey by force. The total lack of appreciation or evaluation of the rights under Article 10 and 11 ECHR and 19 and 21 ICCPR respectively is a further indication that this indictment falls far below proper and ordinary prosecutorial standards. It is an indictment drafted in profound contradiction to fundamental standards of international human rights to which Turkey has agreed to be bound.

102. As the ECtHR noted in its ruling²¹:

“However, the facts imputed to the applicant, which were used as the basis for the questions put to him in the interview and with which he was subsequently charged by the prosecutor’s office, are either legal activities, isolated acts which, at first sight, are unrelated to each other, or activities which were clearly related to the exercise of a Convention right. In any event, they were non-violent activities.

103. On the same point, the ECtHR further noted²²:

“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.”

104. Indeed, the ECtHR noted that the inclusion of activity in exercise of ECHR rights undermined its legitimacy:²³

“As to the relations between the applicant and the NGOs referred to in the bill of indictment, the Court notes that none of the parties dispute that the NGOs in question are lawful organisations which continue to conduct their activities freely...

With regard to the individuals with whom the applicant was in contact or with whom he had telephone conversations, and who were charged with various offences, the mere existence of contacts between the applicant and those individuals can hardly be used to justify inferences as to the nature of their relations. In addition, it must not be overlooked that, in the absence of a criminal conviction, those individuals, described in the prosecution documents as members of a criminal association which had conspired against the Government, enjoy the presumption of innocence under Article 6 § 2 of the Convention.

In any event, the Court finds no sign in the conversations in question of any indication that the applicant, in collaborating with those individuals, was seeking to transform peaceful demonstrations into a widespread and violent anti-Government insurrection.”

²¹ Turkey v Kavala (ECHR 429 (2019) paragraph 146

²² Turkey v Kavala (ECHR 429 (2019) paragraph 150

²³ Turkey v Kavala (ECtHR 429 (2019) paragraph 157

Arbitrary detention

105. A pressing concern with this indictment is an obvious but crucial one: it is the basis upon which those charged have been detained pending trial and upon conviction.

106. The right to liberty and protection from arbitrary detention, including excessive pre-trial detention is protected in both article 5 of the ECHR and article 9 of the ICCPR. These rights also provide for the need for sufficient and clear reasons to justify detention and for any detention to be for a proper and lawful purpose.

107. In the absence of such clear, easily-identified reasons, and in the face of concerns about improper motives in this case, including as concluded by the ECtHR, it is clear that the detention of the defendants in this case on the basis of the current indictment is arbitrary, unlawful and contrary to Turkey's obligations under both article 5 (3) of the ECHR and article 9 ICCPR.

108. This is all the more pressing in light of the continued detention of Mr. Kavala and others and BHRC joins calls for the immediate release of the defendants in this case.

The effectiveness, impartiality and fairness of prosecutors in criminal proceedings

109. Finally, reference should be made to the UN Guidelines on the Role of Prosecutors ("Guidelines") which outline the role of prosecutors in upholding the rule of law. Principle 12 require prosecutors to perform their duties "fairly, consistently and expeditiously" in a way that upholds human rights and protects human dignity. Principle 13(a) requires prosecutors to carry out their functions impartially and without discrimination, and 13(b) requires prosecutors to "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". The Guidelines are complemented and expanded on by the International Association of Prosecutors Standards of Professional Responsibility and Statement on the Essential Duties and Rights of Prosecutors. The Guidelines add specificity to fundamental principles of international human rights law including the right to equality before the law, the presumption of innocence and the right to a fair and public hearing before an independent and impartial tribunal.

110. As outlined above at paragraph 80, there is a profound lack of balance that runs through the indictment such that the indictment as a whole can only be said to constitute a profound breach of international prosecutorial standards.

Other issues concerning the indictment

111. As commented above, the indictment is excessive in length. There must also be a concern as to whether the length and level of detail in an indictment such as this may be used as justification for the length of time given to draft it, particularly when suspects are being held in detention. If there is cogent evidence, presenting it in an indictment should not be a matter of constructing a grand elaborate thesis; it should be clear, straight forward, concise and, therefore, capable of being drafted within a reasonable period of time.

PART D: CONCLUSIONS AND RECOMMENDATIONS

112. The Gezi Park indictment marks a low watershed in the drafting of indictments in complex and sensitive cases. Not only do badly constructed and unbalanced indictments bring about legally poor and unsustainable conclusions, they can do immense damage to the public prosecutor's office of the country which drafts them.

113. Politically sensitive investigations demand balanced evaluation by prosecutors. In this particular indictment, ideological fervor has clearly overtaken sound prosecutorial judgement and analysis of evidence. Here, the indictment lacks all balance and has, within a highly politicised perspective, substituted ideology for evidence. The result is a shoddy and embarrassing document which fails to comply with fundamental standards of international human rights law to which Turkey is bound.

114. Steps should and must be taken to avoid its repetition. In particular:

- i. There should be rigorous oversight of the such indictments by those within the public prosecutor's office, to ensure that a prosecutor does not get 'carried away 'and end up drafting an indictment in line with any official or personal ideology but with scant adherence to the law or objective assessment of the evidence. This is a question of proper management. It is impossible to think that this indictment was properly or sufficiently managed and checked by a competent officer of the law;
- ii. Such indictments should also consider and, if the evidence justifies it, carefully rebut the evidence that may be favourable to the defendants. If the points favourable to the defendants cannot be rebutted by cogent evidence, the case should not be brought;
- iii. Such indictments must take account of fundamental standards of international human rights law, and the standard to which Turkey is bound

as a member of the Council of Europe. If there are good reasons why the presumptions of innocence should not apply to ostensibly lawful activity, this should be spelt out by reference to clear and cogent evidence rebutting it. Likewise, the indictment must be clearly drafted and based on proper lawful purpose and with a clear evidential basis. If it cannot be, the indictment should not be brought.

115. The Gezi Park indictment is, regrettably, a textbook example, as to how not to draft indictments in complex cases.