

**P E N  
N O R W A Y**

Legal report on indictment

**Turkey v Osman Kavala  
and Henri Jak Barkey.  
*'The Espionage Case'***

PEN Norway's Turkey Indictment Project

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# Turkey Indictment Project by PEN Norway

As PEN Norway, we are bringing up press and civil society related cases from Turkey with an innovative approach: The Turkey Indictment Project.

In 2020, with a team of judges, lawyers and scholars we are examining indictments from 12 prominent media and civil society cases, including Cumhuriyet, Büyükaada and Gezi Park trials. Each report focuses on one indictment. An excellent group of legal and human rights experts from five different countries have assessed the 12 indictments' compliance with local regulations and international standards.

Our objective is to provide a tangible ground for discussions concerning the crisis of rule of law in Turkey and support dialogues that aim to improve the standards. You can find all published reports and articles on [norskpen.no](https://norskpen.no).

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

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## About Kevin Dent QC:

Kevin Dent QC is a barrister based in London and practicing in the field of financial and organised crime. He was called to the Bar of England and Wales in 1991 and is an author of the Bar Human Rights Committee of England and Wales’s trial report on the Gezi Park trial, as well as the author of an earlier report for this Indictments Project on the Gezi Park indictment.

# 1: Executive summary

1. The indictment under examination, indictment no. 2020/7041, jointly charges Osman Kavala and Henri Jak Barkey with two offences, namely:
  - Article 328 of the Turkish Penal Code ('TPC'), namely Procuring State Information that Should Remain Confidential for Political or Military Espionage Purposes,
  - Article 309 TPC, namely Attempting to Change the Constitutional Order by Force, Threat and Arms.
2. It alleges that both were jointly involved in espionage, with Turkish businessperson and civil society activist Osman Kavala acting under the direction of American citizen and researcher Henri Jak Barkey to 'procure for political or military espionage purposes information that by its nature in view of the State's security or domestic and foreign political interests should remain confidential'. Further, it alleges that they jointly played a role in organizing and directing the attempted military coup in July 2016. The indictment was filed on 28 September 2020.
3. The Article 328 TPC offence:

## Article 328

(1) A person who secures information that, due to its nature, must be kept confidential for reasons relating to the security or domestic or foreign political interests of the State, for the purpose of political or military espionage, shall be sentenced to a penalty of imprisonment for a term of fifteen to twenty years.

4. Article 309 TPC offence:

Article 309

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

5. This indictment follows an earlier indictment brought against Osman Kavala and 15 others in what became known as the 'Gezi Park' case, centering around the protests that took place in Turkey in 2013. In February 2020, Osman Kavala and other defendants were acquitted of all charges on that indictment, following trial. The indictment in the Gezi Park case has earlier been analysed as part of the Indictments Project. As set out in this report, there is a problematic factual nexus between the two indictments as essentially the same facts are relied upon to support the allegations in both indictments.
6. There are a number of serious problems with this indictment, chiefly:
- i. It does not present evidence such as to give rise to a reasonable suspicion of the offences alleged. As such, the indictment violates the requirement for 'reasonable suspicion' under Article 170(2) Turkish Criminal Procedure Code ('TCPC').
  - ii. Like its predecessor regarding the Gezi Park protests, this indictment is written in predominantly ideological rather than legal terms. This renders it problematic for the court to assess, and for defence counsel to challenge, what appear to be essentially political accusations.

- iii. Rather than setting out cogent evidence to connect the defendants to the offences alleged, the indictment presents an all-encompassing political theory that seeks to connect all major political dissent within Turkey as part of an, almost mystical, single conspiracy against the state. Through such a prism, all protest or involvement in civil society activism is viewed as 'evidence' in support this overarching plot. Such a perspective has replaced the need to provide a coherent analysis and presentation of evidence to support charges.
- iv. In particular, although the indictment presents evidence that Henri Jak Barkey has visited Turkey on a number of occasions and, taken at its highest, *may* have met or been in proximity to Osman Kavala on a few occasions over a number of years, it does not set out any evidence of them doing anything together, or separately, that would be in furtherance of a crime, let alone the serious offences of espionage and seeking to overthrow the state by force.
- v. This lack of a coherent connection between the offences alleged and the evidence presented in the indictment is in breach of Article 170(4) TCPC, which provides that 'The events that comprise the charged crime shall be explained in the indictment in accordance to their relationship to the present evidence'. Consequently, it likewise violates Article 6(3) ECHR and/or Article 14 International Covenant on Civil and Political Rights (ICCPR) right for a defendant to know the nature and cause of the charges brought against them.
- vi. Further, the indictment proceeds without any acknowledgement of the verdicts in the Gezi Park case. Notwithstanding that Osman Kavala and others were acquitted at trial of the accusation that they organised the Gezi Park protests in 2013 as part of an attempt to overthrow the state through force, this new indictment recites the same accusations and

uses these as the basis of the charges against Osman Kavala, but without reference to the acquittals. The silence regarding these acquittals is a glaring omission.

- vii. Further, because the new indictment relies upon essentially the same evidence as presented in the Gezi Park trial so far as Osman Kavala is concerned, it raises the issue as to whether the new indictment represents a breach of Article 4 of the 7<sup>th</sup> Protocol of ECHR as representing further trial on matters that a defendant has already been acquitted of. Article 4, to which Turkey is a signatory, sets out: "...a person may not be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted." Not only has Osman Kavala been acquitted in relation to the Gezi Park protests but, when considering that earlier case, the ECtHR evaluated the evidence as to whether Osman Kavala had conspired with Henri Jak Barkey and found that it was insufficient to provide reasonable suspicion of any offence.
- viii. The lack of reference in the indictment to the Gezi Park trial acquittals is one of a number of aspects where the indictment does not adequately set out material in the defendants' favour, in breach of the requirement for balance under Article 170(5) of the TCPC. The indictment signally fails to consider or take into account the aspects of the case which may be considered as objectively running contrary to the allegations.
- ix. The paucity of evidence presented, taken together with the political context of the filing of the indictment (Osman Kavala's continued detention is contrary to a decision for his immediate release by the European Court of Human Rights ('ECtHR') in December 2019, together with repeated public pronouncements against him by Turkey's

President Erdoğan) give rise to a strong inference that these new proceedings have been brought not for legitimate law enforcement purposes but are, rather, designed to perpetuate his detention and serve as continued deterrence on the activities of rights and civil society activists. Consequently, the indictment is likely to represent further violation of Article 18 of the European Convention on Human Rights ('ECHR').

## 2: Evaluation of the indictment under Turkish law

7. Article 170 of the Turkish Criminal Procedure Code sets out the legal requirements of an indictment:

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.

8. Prima facie, the indictment conforms with the requirements under Article 170(3) in respect of a number of the formalities (a, b, d and h) in that it clearly sets out the identity of the suspects, details who the defence lawyers for Osman Kavala are and indicates the remand status of the defendants, indicating when they were arrested and/or detained. As Henri Jak Barkey has not been detained and does not reside in Turkey, any proceedings against him, therefore, would be brought *in absentia*.
9. This report focusses on what might be termed the substantive requirements of an indictment; whether the evidence collected evidence constitutes sufficient suspicion that a crime has been committed (170(2)), whether the events that comprise the charged crime are properly explained in the

indictment in accordance to their relationship to the present evidence (170(4)) and whether there is balance under 170(5).

### **Article 170(2) – Does the evidence presented provide reasonable suspicion that a crime has been committed?**

10. The indictment and the evidence presented in it has not yet been tested in a court of law. Likewise, unlike the earlier Gezi Park indictment, there has not yet been a full evaluation of the new indictment by ECtHR. Therefore, considerable caution should be exercised before making an assessment of the indictment in the context of Article 170(2). Nonetheless, there are strong indicators of a lack of reasonable suspicion of the offences, given that:

- Although the indictment alleges joint offences in which both defendants colluded to overthrow the state and share state secrets, there is little clear evidence of them ever meeting, other than one public dinner event in 2016, to which others were invited;
- The indictment presents no evidence of the defendants talking or communicating to each other about any of the events in question in the indictment or at any times considered significant in the indictment. The indictment acknowledges that there is little evidence of ‘direct contact’ between the defendants;
- The indictment does not explain in any meaningful way what espionage activities either defendant was involved in;
- The indictment is silent on what sensitive/secret information was either obtained or passed on by either defendant;
- No secret state information was found on either defendant. Any information on Osman Kavala’s phones or other devices appears prima facie to be information already within the public domain.

- The indictment does not set out *how* either defendant actually sought to organise or progress the attempted coup in 2016. Indeed, it is entirely silent on what *either* did to actually advance the coup;
- The indictment presents no evidence that either defendant spoke in support of the coup attempt, either before, during or after. Indeed, the only pronouncements by either highlighted in the indictment are Henri Jak Berkey's comments on the night of the attempted coup, to the effect that it was a bad thing;
- It presents no evidence of either defendant at any point expressing views in support of violent means or the coup attempt. Not that to do so would *in itself* be evidence of any crime but, in the context of an indictment alleging from circumstantial evidence that both sought to support an attempted coup, the lack of either saying *anything* in support of it must be significant;
- It presents no evidence that either were involved in any activity other than that in exercise of lawful and protected rights of freedom of association as a civil society activist and researcher;
- In place of any such evidence, as is set out below, the indictment instead presents a series of pseudo-political theses to seek to portray both as masking under 'guises' of legality in order to (in an unspecified way) cause harm to Turkish society and prepare the groundwork for the coup attempt;
- Rather than presenting concrete evidence, the indictment narrates a chronology in which the movements of each are claimed, without explanation or obvious logic, to be part of a coordinated movement.

11. The preliminary assessment that the indictment does not meet the reasonable suspicion test under 170(2) is bolstered by the ECtHR's earlier assessment of Osman Kavala's detention regarding the Gezi Park trial. To consider this aspect, it is necessary to analyse the new indictment in the context of ECtHR's ruling in *Kavala v. Turkey* (Application no. 28749/18). In the

course of ECtHR considering Osman Kavala's claim that his detention was arbitrary and that the proceedings had been pursued for the ulterior purpose of silencing human rights and civil society activists, ECtHR noted that Osman Kavala had been detained in relation to two accusations:

- i. Related to the Gezi Park events which occurred between May and September 2013 (Article 312 of the Criminal Code)
- ii. Relating to the attempted coup of 15 July 2016 (Article 309 of the Criminal Code, the same article as in the new indictment).<sup>1</sup>

12. ECtHR considered in detail the facts giving rise to detention under Article 309<sup>2</sup> including the same evidence repeated in the new indictment from phone base receiver sections that Osman Kavala's and Henri Jak Barkey's phones emitted signals from the base same station on 18 July 2016, that is two days *after* the attempted coup. ECtHR noted that Osman Kavala had submitted regarding such evidence that this phone station covered a large central district in which many hotels and his office were located.<sup>3</sup>

13. ECtHR then assessed whether the evidence presented gave rise to reasonable suspicion of offences under Article 312 (the Gezi Park protests) and Article 309 (the attempted coup)<sup>4</sup>. Having assessed that there were no reasonable grounds for suspicion in regard to the Gezi Park protests, the ECtHR likewise determined that there was no reasonable suspicion of involvement in the attempted coup. The court stated as follows:

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<sup>1</sup> Kavala v. Turkey (Application no. 28749/18) at Paragraph 4.

<sup>2</sup> Kavala v. Turkey (Application no. 28749/18) at Paragraphs 23-27, 38

<sup>3</sup> Kavala v. Turkey (Application no. 28749/18) at Paragraphs 108

<sup>4</sup> Kavala v. Turkey (Application no. 28749/18) at Paragraphs 139-155

iv) Reasonableness of the suspicions in respect of the attempted coup

154. With regard to the accusations concerning the attempted coup of

15 July 2016, the Court observes that these were predominantly based on the existence of “intensive contacts” between the applicant and H.J.B., who, according to the Government, was the subject of a criminal investigation for participation in organising an attempted coup.

In the Court’s view, however, the evidence in the case file is insufficient to justify this suspicion. The prosecutor’s office relied on the fact that the applicant maintained relationships with foreign nationals and that his mobile telephone and that of H.J.B. had emitted signals from the same base receiver station. It also appears from the case file that the applicant and H.J.B. met in a restaurant on 18 July 2016, that is, after the attempted coup, and that they greeted each other briefly. In the Court’s opinion, it cannot be established on the basis of the file that the applicant and the individual in question had intensive contacts. Further, in the absence of other relevant and sufficient circumstances, the mere fact that the applicant had had contacts with a suspected person or with foreign nationals cannot be considered as sufficient evidence to satisfy an objective observer that he could have been involved in an attempt to overthrow the constitutional order.

**155. In the Court’s opinion, it is quite clear that a suspicion of attempting to overthrow the constitutional order by force and violence must be supported by tangible and verifiable facts or evidence, given the nature of the offence in question.** However, it does not appear from the decisions of the domestic courts which ordered the applicant’s initial and continued detention, or from the bill of indictment, that the applicant’s deprivation of liberty was based on a reasonable suspicion that he had committed the offences with which he was charged.”

14. It is important to note that the new indictment essentially seeks to conjoin the accusations in the Gezi Park protests, for which ECtHR found there was no reasonable suspicion of an offence, together with the accusation of involvement in the attempted coup, for which ECtHR also found there was no reasonable suspicion of an offence. The result of the synthesis of two accusations already determined to be without reasonable foundation must, likewise, be highly likely to be without foundation. Given this previous determination by ECtHR on the offence under Article 309, there must be a strong inference that the new offence of espionage under Article 328 has been brought for the purpose of creating a 'new' charge that can be argued to be not already within the ambit of ECtHR's decision that Osman Kavala be 'released immediately'<sup>5</sup> for the offences under Article 309 and 312.
15. The lack of evidence that would, objectively, give rise to a reasonable suspicion of an offence is both contrary to Article 170(2) TCPC. Further, the paucity of evidence supports other factors indicating that the prosecution is brought for 'ulterior' rather than legitimate law enforcement purposes and, therefore, contrary to Article 18 ECHR. It cannot be overlooked that this indictment is a successor to the Gezi Park indictment, about which the ECtHR ruled in December 2019 to have been brought without reasonable suspicion of any offence and for ulterior motives in violation of Article 18.
16. Given that the filing of this indictment has had the effect of perpetuating Osman Kavala's detention, contrary to a ruling of ECtHR for his immediate release in December 2019, the ostensible lack of evidence of any offence provides further indication that the new indictment is brought for ulterior political purposes and is, in its way, an aggravated form of violation of Article 18; an indictment brought for the purposes of outrunning the ECtHR's

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<sup>5</sup> Kavala v. Turkey (Application no. 28749/18) at Paragraphs 240.

condemnation of an earlier indictment for violation of Article 18. Indeed, the filing of the indictment on 28 September 2020 was one day before the Turkish Constitutional Court was due to rule on the lawfulness of Osman Kavala's continued detention and had the effect that the Constitutional Court postponed its determination. At the time of writing, Osman Kavala remains in detention.

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

17. In this respect, the indictment is defective. The principal areas of concern are that the strong ideological slant of the indictment goes hand in hand with a lack of a coherent causal connection of evidence to charges in such a way as to make the charges unintelligible. Consequently it would be difficult or impossible for a court of law to fairly assess and for the defence to properly challenge the indictment. This indicates not only a breach of this requirement of TCPC but also that the defendants' rights to a fair trial under Article 6 ECHR are being breached.

#### ***The ideological nature of the indictment***

18. The indictment presents a grand political theory which appears to have replaced objective, forensic and legal analysis of the evidence.

19. In cases such as this, it is important to forensically examine investigation material and present it in a clear way, free of political ideology and animus. As ECtHR said concerning an offence under Article 309 "it is quite clear that a suspicion of attempting to overthrow the constitutional order by force and violence must be supported by tangible and verifiable facts or evidence, given the nature of the offence in question." For instance, if evidence supports charges such as espionage under Article 328, it should be possible to present this in a tangible way. For instance, where Suspect A is seen to meet with

Suspect B and then to hand over a memory card containing sensitive secret information, a case of espionage can be understood.

20. In this indictment, however, we have the opposite; conspiracy theory appears to have substituted itself for evidence. This report considers only a few examples of the, very many, instances where ideology has supplanted the need for evidence.
21. The following passage from the introductory section of the indictment (page 3/71) sets the ideological tone:

“As has been stated on numerous occasions, it is a known fact that the Gezi Park Uprising incident was an event which took place in the very wake of the processes whereby FETÖ/PDY had striven for about forty years to take over all areas of the state of the Republic of Turkey alongside the important ones such as the social, economic, judicial, military and civil areas, and had infiltrated the tiniest units of the machinery of the state; by means of which it openly endeavored to weaken the legitimate government through the Ergenekon, Sledgehammer and 7 February National Intelligence Organization plot attempts in which it tried to usurp state rule with initial recourse to judicial procedures; and in which, following the ending in failure of the Gezi Uprising, it staged a judicial coup attempt comprising the creation of false evidence in the 17/25 December 2013 proceedings courtesy of its structure inside the judiciary; and, by way of continuation, it organized the National Intelligence Organization’s Trucks Plot with a view to creating the perception that terrorist organisations were being aided again to strain the circumstances of the legal and legitimate government in the international arena; and, upon the failure of all these plots, it engaged in a coup attempt with the aim of taking hold of and changing the constitutional order on 15 July 2016 by placing trust in the force it had created in all units



of the machinery of state and particularly the structures inside the police and military.”

22. Thus, in one long sentence, the indictment presents not just the Gezi Park protests but all of the upheavals and protests of recent years as different aspects of one alleged heterogeneous yet homogenous conspiracy. Within such an all-encompassing ideological perspective, any support for protests and or criticism of the ruling government at any point over the last seven years can be viewed as evidence of encouragement or support of the plot.
23. The indictment repeats, without evidence, essentially the same theories about George Soros organizing and directing dissent within Turkey that formed the basis of the earlier Gezi Park indictment, The following passage is one of many similar (3/71):

“It has it has been determined that the suspect Mehmet Osman KAVALA has connections with George Soros, director of the Open Society Foundation which organised and financed the supposedly freedom-themed events popularly known globally as the Arab Spring that started in 2013 and earlier; the Open Society Foundation targets regime change in countries by pursuing segregation and social division through accentuating differences in social and demographic structures in the Republic of Turkey state just as in Arab countries; the suspect Mehmet Osman KAVALA, by conducting research into the cultural and social situation of our country’s people through both Anadolu Kültür S.A. and the other CSOs, companies and entities of which he is the founder and director, has both obtained detailed and important information and engaged in segregationist activities...and the actual aim of the activities consisting of the actions and processes he engages in with talk of developing so called democratic freedoms and spreading them to the grassroots of society is to incapacitate the legitimate democratic government, incite segregation within society and cause harm by weakening

the unity and togetherness of our citizens with the state and nation to the detriment of national interests and the benefit of foreign states and intelligence organisations.”

24. Within such a, profoundly ideological framework, the work of civil society activists such as Osman Kavala in encouraging democratic freedoms and human rights is presented as a means of inciting segregation within society. The theme that civil society groups are actively seeking to weaken the unity of Turkish society, *segragationism*, runs unchecked throughout this indictment and is the opposite of an objective legal presentation of evidence. Osman Kavala’s work in providing funding for documentary projects such as a film on citizens of Kurdish and Armenian origin are, therefore, presented as aimed at dividing different groups within society in order to weaken it in preparation for armed insurrection.
25. Further, the reference above to Osman Kavala obtaining “detailed and important information” appears to portray obtaining ordinary information in the course of civil society work as part of his alleged espionage. It is difficult to see how a court of law can evaluate such theses nor how lawyers for the defence would be able to challenge them. Moreover, these passages beg the question who this indictment is being written *for*? There must, indeed, be a suspicion here that it is drafted for a political readership rather than for the parties in the proceedings.
26. Moreover, such passages have an effect on the fairness of any subsequent proceedings. When the political ideology of a ruling party runs unchecked through an indictment, for any lawyer or judge to challenge or deny such a thesis is capable of being viewed as tantamount to a repudiation of the ruling party. Of course, that is not to say that lawyers are not able to make submissions about the paucity of tangible evidence or for judges cannot consider them, but such a strong political slant makes objective impartial

assessment of the evidence more difficult. Such a concern is by no means hypothetical; following the acquittals in the Gezi Park trial in February 2020, the trial judges were placed under investigation by the Association of Judges and Prosecutors and the verdicts of acquittal were described as ‘maneuvers’ by Turkey's President Erdoğan.

27. At a more basic level, a considerable amount of the material presented in the indictment is incapable of *legal* assessment; how is a court supposed to assess or rule on accusation that promoting the rights of different groups within society has the effect of creating division within society and a feeling of otherness within it?

### ***Lack of clarity and coherence***

28. Commensurate with the predominantly political tone of the indictment, is a lack of clarity and coherence.
29. In particular, there are a number of rambling and unexplained comments. The following passage from the introductory section concerning the 2013 Gezi uprising (page 9/71) is typical:

“The uprising was coordinated on behalf of the Open Society Foundation by the foundation’s founding member, the suspect Mehmet Osman Kavala, that Mehmet Osman Kavala exerted great influence particularly over Taksim Platform, Taksim Solidarity and the Forum Coordination which was rolled out widely in the advanced stages of the uprising and, even if he did not officially have membership in these, the decisions taken were not taken without consulting the suspect Mehmet Osman Kavala, that all international endeavors relating to the Gezi Uprising were set up through the suspect Mehmet Osman Kavala, that the suspect Mehmet Osman Kavala was informed of the needs of the activists participating in the Gezi Uprising and

these were met, and that work involving the use of all manner of visual broadcasting methods such as documentaries, films and exhibitions with a view to increasing interest in the uprising both in Turkey and abroad and putting pressure on the State of the Republic of Turkey and the setting up of new media structures took place under the suspect Mehmet Osman Kavala's organisation."

30. Prima facie lawful activity such as attending film festivals and meeting with members of human rights organisations is, therefore, said to be in furtherance of armed insurrection, but without explanation as to how. In the same way, participation in a photographic exhibition at the European Parliament is presented as being part of the preparing the way for the attempted coup.
31. The indictment also presents evidence of the travel of the two defendants, but without ever setting out the significance of the travel in the context of the charges alleged. For instance at 41/70, the indictment states:

When the records for entry from abroad and exit for the suspect Mehmet Osman Kavala were examined, it was identified that the suspect went abroad more frequently prior to the 15 July attempted coup than in previous years.

32. How such travel is related to the crimes alleged is simply not explained. Likewise, dates when the defendants did not travel together or meet is presented, without explanation, as evidence that they jointly prepared an attempt to overthrow the state. Consider, for instance the following (37/71):

It was established that the suspect Henri J. Barkey was in Istanbul from 26-29 June.; on 30 June 2016 he went to Diyarbakır province, and had various meetings in the Yenişehir, Bağlar, Sur and Kayapınar districts, returning to

Istanbul on the evening of the same day, and remained in Istanbul province until 3 July 2016.

It was identified that the suspect Mehmet Osman Kavala meanwhile, on 27 June 2016, one day after the arrival of the suspect Henri Jak Barkey in Istanbul, went to Diyarbakır province, and after having various meetings there, returned the same day to Istanbul.

33. What either was doing in Diyarbakır province, at *different* times, or how it might have supported a coup attempt, is nowhere explained. A sequence of, ostensibly, unrelated travel is presented in the lead up to the following conclusion (37/71):

“Taking account of the chain of events elaborated on above, it has been ascertained that the activities prior to the 15 July coup attempt of the suspects Mehmet Osman Kavala and Henri Jak Barkey intersected with the coup attempt preparations; that both suspects had prior knowledge of the coup attempt and set up a host of connections domestically and abroad to create the infrastructure of the coup attempt”.

34. The evidence as to *how* either defendant had foreknowledge of the coup attempt is not presented. The indictment presents a series of meetings and seminars that Henri Jak Berkey attended, but without setting out how they are connected either to espionage or in support of the attempted coup.
35. The indictment, understandably, focusses on the events surrounding the attempted coup on 16 July 2016. It closely analyses Henri Jak Barkey’s movements at a conference event on Büyükada island near Istanbul at that time, but without setting out how participation at the conference or his activities at the time boosted, supported or helped organise the attempted coup. The evidence establishes that Henri Jak Barkey monitored the events on television and made international calls that night, but it must be highly likely

that *most* people in Turkey at that time also monitored the dramatic and important events that were broadcast on a number of television channels.

36. How such activity was in furtherance of a crime, however, is not explained in the indictment, nor is evidence presented of anything said or done by him at that time, or previously, to organise or direct the attempt.
37. Following a lengthy section setting out the legal framework for a charge of espionage under Article 328 TPC, the indictment then sets out the case the defendants for that charge. This sets out a thesis but does not set out any evidence to substantiate them. In the following passage, highlighted in bold are matters for which no evidence is presented:

“Considering the actions of the suspects in light of these explanations, it was determined that the suspects **established parallel contacts with insider officers** playing a covert role in the organisation that conducted and directed this attempt on behalf of the FETÖ/PDY armed terrorist organisation prior to the coup attempt, and thus made preparations for the coup attempt; that **they were in contact and direct relations** and that **they took initiatives** with the aim of **coordination with the persons and groups who were likely to take on legal or illegal duties** within the new administration to be formed after the coup attempt’s success; that in this context, they travelled extensively domestically and abroad; that they travelled and **held meetings** successively, **including with the insider officers of the organisation**; [and] that their contacts in the form explained, which took place with an unusual intensity, were within the **scope of preparations** for the coup attempt. It is also understood that one of the suspects, Henri Jak Barkey, came to our country the day the coup attempt was attempted; that in this context, he organised a meeting **in order to hide his activity**; as also explained in the previous sections of the indictment, that he postponed the date of this meeting with unreasonable excuses until the day of the coup

attempt; [and] that on the day of the coup attempt, **he directed the process** by following the attempt from a relatively safe distance considering the attacks that could be experienced and were experienced due to the coup attempt in our province Adalar.

As also stated by those whose statements were taken as witnesses within the scope of the file, it was determined that Henri Jak Barkey, unlike the other delegates who stayed with him, closely followed the developments regarding the coup attempt during the night and made contacts, in a tense mood, **that could be regarded as directing the process**; [and] that in this context, foreign persons and institutions that **were in contact with him** shared the travel information of the President of the Republic of Turkey on social media. Within the scope of these activities, **it is quite obvious that the suspects took active roles in the coordination and maintenance of the coup attempt** attempted by members of the FETÖ/PDY armed terrorist organisation in **favour of foreign states**, followed the actions in situ, and **intervened in the process with the coordination and contacts** they established, when necessary.”

38. In terms of the offence of espionage under Article 328, the indictment states that the state secret information that the defendants procured was (page 61) “obtaining information that has sociological, economic and political content, which should be kept confidential in terms of the security of the state or foreign political benefits of the state.” The indictment, however, does not provide any explanation as to why working on the sociological, economic, political context of the country through work in civil society organisations in producing analysis can in any meaningful sense be collecting “confidential information.” Not only is this definition meaningless, but it would also prima facie criminalise the work of all such civil society and rights organization. Indeed, finding out information about the society in which citizens live would become evidence of a crime. Such a definition is not only legally meaningless,

it also presents a full-frontal attack on basic rights of association and expression.

39. It is noticeable that, notwithstanding the seriousness of the allegations, no serious attempt has been made in the indictment to link Osman Kavala to any activity or role in either espionage or the attempted coup. Consequently, given the lack of coherent evidence, it is hard to resist the conclusion that the indictment is a piece of political theatre rather than a legal instrument and one designed to perpetuate the detention of Osman Kavala.

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

40. 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;”



41. Unfortunately, there is little sense of balance to be found in this indictment.

Although the indictment does acknowledge that there was little 'direct evidence' of communication between the two defendants, there are a number of other basic aspects to the evidence that would require comment and evaluation in the indictment in order for there to be due balance, which are absent here. They include:

- i. Neither of the defendants are presented as expressing any comments in favour of armed insurrection and/or support for any coup or overthrow of the state;
- ii. Neither of the defendants are presented as taking any actions that, objectively viewed, aided or advanced an attempted military coup;
- iii. No evidence of either defendant having contact with any of the organisers of the attempted coup;
- iv. The lack of any evidence to suggest that either defendant was in possession of information that could be considered state sensitive espionage material;
- v. The lack of any acknowledgement that Osman Kavala and others were acquitted of the charges that they directed the Gezi Park protests. Likewise, the lack of causal connection between these protests in 2013 and the attempted coup in 2016.
- vi. The activity of both defendants comes within the ambit of prima facie legal activity in exercise of rights of freedom of association and expression.

42. More generally, the indictment consistently presents the activities of the defendants in civic society within an extreme and hostile ideological perspective that is the very opposite of a fair objective balanced evaluation of the evidence such as is mandated by TPC.

## 3: Evaluation of the indictment in terms of international standards

43. In addition to failing to comply with TPC, the indictment is also at odds with rights enshrined within the ECHR and the International Covenant on Civil and Political Rights (“ICCPR”) to which Turkey is a signatory.

### Right to a fair trial

44. 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.

45. 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. He is therefore highly unlikely to be able to have a fair trial. He is also unable to challenge his detention.

46. 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.”

47. 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.

48. 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.

49. 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. Further, the indictment presents the collection of ordinary information about society through social activism work as collecting confidential espionage material.

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

### **Freedom of expression and association**

51. 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.

52. All, of the activity of the defendants as described in the indictment was *prima facie* lawful activity protected by these rights (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, attending seminars and conferences, etc.). 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.

53. 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 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.

### **The effectiveness, impartiality and fairness of prosecutors in criminal proceedings**

54. 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.

55. As outlined above, 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.

## 4: Conclusion

56. Politically sensitive investigations demand balanced evaluation by prosecutors. In this particular indictment, however, ideological fervor has clearly overtaken sound prosecutorial judgement and analysis of evidence. The indictment lacks due balance and has, within a highly politicised and hostile perspective, substituted ideology for evidence. The indictment is also in serious breach of domestic law and international human rights standards.
57. The indictment is so problematic that it is hard to meaningfully set out how it could be improved, particularly where there is a strong inference that it has been presented for ulterior motives, in violation of Article 18 ECHR. It is hugely concerning that Osman Kavala remains in detention on the basis of a flawed indictment that has replaced an equally flawed indictment. ECtHR's damning

ruling on the earlier indictment has not resulted in an improved approach in this successor indictment.

58. The strong political slant of the indictment, its reversal of the presumption of innocence and lack of coherence strongly suggest a violation of the Article 6 right to a fair trial. Osman Kavala's acquittal from the Gezi Part trial give rise to a concern that he is now being prosecuted for essentially the same matters that he has already been acquitted of, in breach of Article 4 of the 7th Protocol of ECHR. The indictment also seeks to criminalise ordinary civil society activism and human rights work in a way that is in violation of Articles 10 and 11 ECHR.

59. Indeed, the logical consequence of the indictment is that all work to enhance the rights of those within Turkey can be viewed as *prima facie* criminal and seeking information about Turkish society can be viewed as a means of gathering confidential material for the purposes of espionage. That just demonstrates how dangerous this indictment is and how far from reality and legal requisites it has strayed.