



TRIAL OBSERVATION REPORT

Altan and Others v. Turkey: journalists on trial after the coup

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Bar Human Rights Committee

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

The BHRC aims to:

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

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

Executive Summary

From 19-21 June 2017, BHRC executive board member Pete Weatherby QC attended the first substantive stage of the trial of seven journalists in the case *Altan and Others*. The trial observation stems from BHRC's previous concerns at the extent of the dismissals and detentions of judges, lawyers and journalists following the failed coup of July 2016 and at the concerning findings from observations of BHRC executive board member, Grainne Mellon, who attended part of the trial of journalists from the *Taraf* newspaper in September 2016.

The case *Altan and Others* charges 17 journalists and other media workers with serious offences relating to the failed coup. These charges include attempting to overthrow the Turkish Grand National Assembly, attempting to overthrow the Government of the Republic of Turkey, attempting to abolish the constitutional order and support or membership of an armed terrorist organization.

Based on BHRC observations, the *Altan and Others* prosecutions raise serious concerns about fair trial rights and the rule of law in Turkey. Such concerns include the role of the judiciary, its independence and relationship with the prosecution, a lack of sufficient access to defence lawyers during pre-trial detention, insufficient pre-trial disclosure and a lack of sufficient evidence to establish a prima facie case to warrant continued detention and prosecution. The proceedings had the appearance of a 'show trial'.

In addition, the detention and prosecution of at least 169 journalists on spurious charges of supporting the coup represents a sustained and serious attack on freedom of expression.

Although Turkey is a sophisticated, modern democracy that signed and acceded to the ECHR and ICCPR many years ago, the response to the coup – the mass detentions and trials, the huge number of dismissals, the continuance of the state of emergency, changes to the constitution to vastly increase executive power, and the suppression of opposition – has done precisely that which the government charges the alleged plotters: diminished the rule of law and substantially undermined the democratic institutions.

BHRC urges the government and the judiciary (where appropriate) to:

- a. Honour constitutional and international commitments to the rule of law and fundamental rights and protections;
- b. Re-evaluate whether the state of emergency remains necessary,
- c. Introduce measures to reinstate the independence of the judiciary and prosecution.
- d. Release all those detained in the aftermath of the coup and discontinue charges unless there is clear and substantial evidence of actual criminality whereupon bail provisions should be properly implemented.
- e. Make a public commitment to ensure that freedom of expression is robustly protected and that journalists will be safeguarded from arrest and prosecution for investigating, reporting and commenting on issues of the day.

Introduction

1. Following the failed coup of July 2016, the Turkish Government immediately embarked upon a programme of mass dismissals from the military, police, judiciary, state prosecution service and other public institutions of different kinds.
2. Tens of thousands have been detained and face trial. These include judges, lawyers and journalists. The President declared a 'state of emergency' and a subsequent constitutional referendum held in controversial circumstances has given him sweeping new powers. The government's position is that those behind the attempted coup had infiltrated the state and that the measures taken are necessary to protect the state. Critics, both domestically and internationally, fear or conclude that the government has used the failed coup to silence all opposition.
3. BHRC raised concerns at the extent of the dismissals and detentions in the immediate aftermath of the coup. In September 2016, BHRC attended part of the trial of journalists from the *Taraf* newspaper, following concerns that the detention and prosecution of journalists was an attack on 'freedom of expression'.
4. In that context, Pete Weatherby QC attended the first substantive stage of another trial of seven journalists, *Altan and Others*, from 19-21 June 2017. Some of the accused are common to both trials.

Terms of reference

5. The mission was undertaken to build upon BHRC's previous observation of preliminary hearings of journalists in September 2016 in order to assess and report on the compliance of the Turkish courts with international fair trial standards. Particular concerns relate to the independence of the judiciary and the protection of judges, prosecutors, defence lawyers and journalists, which are of paramount importance to the rule of law, codified within the International Covenant of Civil and Political Rights and the European Convention of Human Rights, to which Turkey is bound as a signatory party.
6. As stated, BHRC attended the preliminary stages of a trial of journalists connected to the *Taraf* newspaper, in September 2016. Executive committee member Grainne Mellon prepared an interim report raising a series of concerns relating to that trial¹. The *Taraf* trial continues but many the accused were also indicted in the instant trial, *Altan and Others*, which involves seventeen journalists, ten of whom have not been apprehended and are therefore not before the court. Consequently, BHRC determined to send an observer to the *Altan* trial; the subject of this report.

¹ <http://www.barhumanrights.org.uk/wp-content/uploads/2016/11/BHRC-Interim-Taraf-Report.pdf>

The first substantive stage of the trial was heard between 19 and 23 June 2017 and the next stage is due to be heard on 19 September 2017.

7. During the observation, BHRC was approached by a number of relatives of journalists facing other similar trials. The *Altan* trial has prominence because several of the accused are well known figures; however, BHRC understands that there are at least 169 journalists currently facing criminal charges as a result of the current crackdown². In observing and reporting on the *Altan* trial, BHRC believes that similar issues are likely to be applicable to some or all of those cases.

Acknowledgments

8. The mission was assisted by P24 (Turkish 'Freedom of Expression' NGO), Article 19, and PEN International and was conducted concurrently with other observers as detailed below. BHRC is grateful for the assistance given.

Funding

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

² <http://platform24.org/en/media-monitoring/485/journalists-in-state-of-emergency---65>

Hearings observed

10. The first substantive stage of the trial was heard between 19 and 23 June 2017. BHRC was able to observe most of the first three days of this stage of the trial.
11. Other international observers included consulate officials from the UK and Germany, an internationally renowned media lawyer from the US, Richard Winfield, representing the *International Senior Lawyers Project*, representatives of 'freedom of expression' NGOs: *P24*, *Index on Censorship* and *Article 19*, as well as representatives from *Amnesty International*, *Human Rights Watch*, *PEN International*, *Norwegian PEN* and *Reporters Sans Frontieres*.

Meetings undertaken

12. BHRC met with a number of defence counsel, and defendants and family members from other similar cases, NGOs from Turkey and elsewhere, a representative of the British Consulate, and journalists who were also observing the proceedings. BHRC gratefully acknowledges the assistance and information provided to us during the observation.
13. BHRC attempted to contact the Turkish Justice Ministry and Prosecution Service prior to the observation, but unfortunately, we received no acknowledgement or reply. To date, there has been no response to our letter. It assists and is recommended practice for the state to engage with trial observers. BHRC will forward this report to the Turkish Justice Ministry and Prosecution Service in order to allow the opportunity for comment and to pursue engagement in the future.

The charges & indictment

14. Indictment No. 2017/127, submitted by the Istanbul Chief Prosecutor's Office, was approved by the 26th High Criminal Court on 3 May 2017. The indictment charges 17 journalists and other media workers with serious offences relating to the failed coup. Six of the defendants - Nazlı Ilıcak (NI), Ahmet Altan (AA), Mehmet Altan (MA), Fevzi Yazıcı (FY), Şükrü Tuğrul Özşengül (STO) and Yakup Şimşek (YS) are held in pre-trial detention while Tibet Murad Şanlı (TMS) is on bail, subject to judicial control. The other 10 accused are 'at large' and arrest warrants have been issued.
15. NI, AA and MA³ are charged under the Turkish Criminal Code (TKC) with three main counts:
 - a. Attempting to overthrow the Turkish Grand National Assembly or prevent it from fulfilling its duties, contrary to Article 309/1.
 - b. Attempting to overthrow the Government of the Republic of Turkey (the "Government") or prevent it from fulfilling its duties, Article 311/1.
 - c. Attempting to abolish the constitutional order, Article 312/1
16. Each of these counts carries a possible 'aggravated' life sentence: a sentence without prospect of early release. This is itself contrary to Article 3 ECHR.⁴
17. In addition, they are charged with 'Committing crimes on behalf of an armed terrorist organization without being a member', Article 314/2, which carries an additional 5-10 year sentence.
18. The other defendants are charged with the main offences plus 'membership of a terrorist organisation'.
19. The indictment is 247 pages long and serves as a summary of the case. Defence lawyers claim that the indictment is largely a 'cut and paste' from other indictments, evidencing this by reference to the fact that a name from another trial has been mistakenly left in the document. Almost the entire indictment deals with what the prosecution and court refer to as the 'Fethullah Gulen Terrorist Organization' (FETÖ), its history and its activities, asserting that it was responsible for the failed coup, and the indictment also details the progress of the failed coup itself. The allegations against each defendant are extremely limited.

³ NI is a senior journalist and ex-MP, AA is a high-profile columnist and novelist and MA is an Economics Professor.

⁴ *Ocalan v Turkey* (No 2), No. 24069/03 at [193-207]: <http://hudoc.echr.coe.int/eng?i=001-142087>

20. The following allegations are made in the indictment to make out the case that FETÖ was behind the coup. It is alleged that FETÖ:

- Was responsible for instigating an investigation on 7 February 2012 into Hakan Fidan, Undersecretary of the MİT [the National Intelligence Organization] based on fabricated evidence, with intent to undermine the Government.
- Provoked the mass anti-Government protests at Gezi Park in the summer of 2013.
- Carried out corrupt investigations into state security and intelligence units, known as 'Selam Tevhid,' with the intent to undermine them.
- Carried out fabricated anti-corruption operations of 17-25 December 2013, which directly targeted Government officials.
- Used armed police units under its control, in Istanbul on 17-25 December 2013, with intent to bring down the Government.
- Used military units under its control to intercept MIT trucks carrying humanitarian aid, between 1 and 19 January 2014.
- Used fabricated corruption cases to remove military commands and replace them with Gulenist officers – in particular, through the Ergenekon⁵ and Balyoz⁶ (Sledgehammer) cases.
- Promoted Turkish Armed Forces (TSK) personnel who were supporters of FETÖ and purged adversaries.

21. The indictment goes on to assert that with the failure of some of these investigations and activities the Gulenists then moved to seize control of the state through an armed military coup using their supporters in the TSK and police.

22. The indictment asserts that the Gülen movement is a terrorist organization, citing decisions of the National Security Council (MGK) of 26 February 2014 and 26 May 2015 and a ruling of the Erzincan High Criminal Court of 16 June 2016. In addition, the prosecution relies upon the fact that the coup itself involved armed military actions including shootings and aerial bombing of the Presidential palace.

23. Beyond supporters in the military, police, judicial system and state bureaucracy, the prosecution alleges that FETÖ controlled various print and broadcast media⁷, and had influence in other media. Some journalists and media executives are alleged to be FETÖ supporters; others were allegedly used to promote the

⁵ 275 people, including senior military commanders were convicted in 2013 of plotting a coup. In 2016 their convictions were quashed with the Court of Appeal indicating that evidence had been fabricated:

<http://www.reuters.com/article/us-turkey-coup-trial-idUSKCN0XI1WS>

⁶ 300 defendants, again including senior military officers were jailed in 2012 for coup plotting. In 2015 the convictions were overturned on appeal due to fabricated evidence:

[https://en.wikipedia.org/wiki/Sledgehammer_\(coup_plan\)](https://en.wikipedia.org/wiki/Sledgehammer_(coup_plan))

⁷ Including the Zaman and Taraf newspapers and Can Erzincan TV station.

organisation's aims, for example by legitimising investigations based upon false and fabricated evidence.

24. With respect to the accused, the indictment contains scant allegations or details of what criminal acts they are said to have committed. A key part of the case against AA, MA and NI is their participation in a television programme on 14 July 2016, the day before the coup, during which they are said to have sent "subliminal messages" to the coup plotters.
25. AA is also said to be linked to the coup by the fact that he was editor of *Taraf* until 2012 and by a number of articles he wrote which were strongly critical of the President. Some of his articles were said to have led to the Balyoz case and he is allegedly linked to a leading Gulenist by telephone calls and two witnesses. In essence, AA is said to have influenced public opinion, had prior knowledge of the coup, and assisted in creating the conditions for it.
26. MA is alleged to be similarly linked to FETÖ. He had contact with the same Gulenist figure as AA and six \$1 bills were found in his house (alleged to indicate support for FETÖ). In addition, MA had attended a seminar at the AKABE Foundation subsequently investigated by Gulen supporters in the judiciary, but had not himself been subject to investigation. The suggested inference appears to be that MA would have been included in the investigation if he was not deemed a FETÖ supporter. Articles by MA are said to have supported the Balyoz investigation and in the aftermath of 15 July 2016 he is alleged to have denied that Gulen was behind the coup. Phone records are alleged to link MA to a number of Gulen sympathisers.
27. Whereas AA, MA and NI are alleged to have furthered the aims and objectives of FETÖ, others on the indictment are accused of membership of the organization on the basis of having accounts at a bank associated to Gulen⁸ and making television adverts for the allegedly pro-FETÖ newspaper, *Zaman*.

⁸ Bank Asya: <https://www.bloomberg.com/news/articles/2016-07-18/turkey-halts-gulen-linked-bank-asya-operations-after-failed-coup>

Historical and political background

28. On 15 July 2016, an attempted coup took place in Turkey. Within hours it had failed. There was significant loss of life; the presidential palace was bombed.
29. President Erdogan immediately blamed Fatullah Gulen, a cleric who runs a large network from the US, and declared a 'state of emergency', which gave him sweeping powers exercised by decree. The state of emergency is still in place.
30. Gulen had been associated with the President and his ruling AKP party until late 2013, when, it is alleged, judges and prosecutors sympathetic to Gulen opened corruption investigations against the President, alleging a "gold for gas" scheme with Iran, which exploited a loophole in international sanctions relating to the nuclear programme.⁹
31. In May 2016, the Turkish cabinet designated the Gulen Foundation a "terrorist" organization. By that time the Government had already shut down several media organisations and companies said to be pro-Gulen, blocked websites, and started to remove alleged sympathisers from office. Many were detained.¹⁰
32. President Erdogan has alleged that over many years Gulen's organization infiltrated all sections of the state – the police and army, the judiciary and state prosecutors' office, educational institutions and the departments of state, and controlled sections of the media - using their supporters to undermine the legitimate Government and set up a parallel state.
33. Following the coup, Turkey has asked the US to extradite Gulen, but to date this has not occurred and it is unclear whether any formal legal application has been lodged with the US administration. Immediately the coup failed, President Erdogan issued a series of decrees removing tens of thousands of alleged Gulen supporters from the military and police, the civil service, and other state institutions, including universities. Many were detained, as were lawyers, academics and journalists allegedly connected to Gulen.
34. BHRC previously has expressed concern at the speed and scale of the removal and arrests of judges and prosecutors as well as defence lawyers and journalists in the immediate aftermath of the coup¹¹.

⁹ <http://www.nytimes.com/2013/12/26/world/europe/turkish-cabinet-members-resign.html> and: https://en.wikipedia.org/wiki/2013_corruption_scandal_in_Turkey

¹⁰ <http://www.reuters.com/article/us-turkey-gulen-idUSKCN0YM167>

¹¹ <http://www.barhumanrights.org.uk/bar-human-rights-committee-and-bar-council-urge-theresa-may-to-raise-turkish-human-rights-concerns-in-erdogan-meeting/>

35. Two days after the coup, the *New York Times* commented:

*The sheer numbers being detained or dismissed were stunning: nearly 18,000 in all, including 6,000 members of the military, almost 9,000 police officers, as many as 3,000 judges, 30 governors and one-third of all generals and admirals, as well as President Recep Tayyip Erdogan's own military attaché.*¹²

36. By May 2017, the *Economist* was reporting more than 4,000 judges and prosecutors – about a quarter of the total – had been dismissed by decree under the state of emergency. Most of them were arrested and remain in detention, including two members of the Constitutional Court¹³. It is unclear how many others have been dismissed and detained in connection with the coup but reports indicate that the figure is at least 150,000 dismissals and 50,000 arrests. In the run up to the anniversary of the failed coup, a further 7,000 civil servants and academics were dismissed from their jobs.¹⁴

37. In addition, an April 2017 referendum, undermined by allegations of an “uneven playing field” due to the state of emergency and curbs on freedom of expression, and electoral fraud¹⁵, has vastly increased the powers of the President and has changed the way judges are appointed – from a judicial selection committee to direct appointment by the President and parliament, which his party controls. According to the *Economist* (and lawyers to whom BHRC has spoken), virtually all judges recently appointed to replace those dismissed are connected to the ruling AKP party.¹⁶

38. Obvious grave concerns regarding the independence of the judiciary were underlined earlier this year in relation to the trial of 21 journalists. They were alleged to be part of the Gulen movement. The court had released them from pre-trial detention. However, the decision was reversed and the judges suspended¹⁷.

¹² <https://www.nytimes.com/2016/07/19/world/europe/turkey-erdogan-crackdown.html>

¹³ <http://www.economist.com/news/europe/21722200-president-erdogans-drive-power-includes-putting-judges-under-his-thumb-turkeys-purges-are>

¹⁴ <http://www.bbc.co.uk/news/world-europe-40612056>

¹⁵ <http://www.telegraph.co.uk/news/2017/04/17/turkish-referendum-opposition-plans-appeal-against-last-minute/> and <http://www.osce.org/odihr/elections/turkey/324816?download=true>

¹⁶ the economist: link as fn 5.

¹⁷ The economist: link as fn 5.

The history of the legal proceedings

39. BHRC was informed by defence counsel that prior to this stage of the trial:

- a. The accused, on arrest, were refused access to lawyers for 5 days and only brought before a judge after 12 days.
- b. Over the following months, access to lawyers was restricted to one hour per week.
- c. At the interview stage, no prior disclosure of the allegations or charges was provided. As a result, advice was given for the accused to 'no comment' the interviews. Each of the defendants followed that advice. Under Turkish law no inference can arise from this course of action.
- d. Some of the allegations and charges were apparent from the questioning, but the case against the accused and the evidence file was not provided to them or their lawyers until after the Court had approved the indictment on 3 May 2017, more than eight months after their arrests and detention.
- e. After receiving the prosecution case, the defendants provided written statements to their lawyers, however, these had to be communicated via the prison authorities. It took 25 days from surrendering the statements to the authorities for them to be given to the lawyers. It is not known what happened to the statements during that time but it is assumed by defence lawyers that they were provided to the prosecution and investigatory authorities.
- f. Some applications to exclude evidence were made and rejected prior to the first substantive stage of the trial on 19 June 2017.

The first substantive hearing: 19-23 June

40. The trial hearing took place at the 26th High Criminal Court, Istanbul. The trial is being heard by Chief Judge Kemal Selcuk, Judge Sabri Alca, and Judge Omer Faruk Karakilic, who sit in the traditional way, on a raised platform at the front of the court. To their right sits the prosecutor, Mehmet Ilker Durmaz, on the same level and in similar robes. The defendants sat in front of the judges in the well of the court together with security guards, with counsel down the sides of the court; the lead defence counsel is Veysel Ok. The public gallery was at the rear of the court.

State Summary & Questioning of Defendants

41. At the outset of this stage of the trial the senior Judge 'summarised' the indictment in a process that took about three hours. The summary went into considerable detail regarding the Gulenist organization and the attempted coup. Very little was said regarding the alleged activities of each of the accused. The defendants were then called to deliver their own oral and written statements, preceded by the Judge

summarizing the elements of the case against them. At the end of the statements, supplementary questions were asked by other defence lawyers. The process then allows for the prosecution to ask questions, however, in each case they declined. In fact, the prosecutor did not speak throughout the entire five days of this stage of the trial.

Defendants' Responses

42. Each defendant gave lengthy denials of sympathy with the coup and the Gulenist movement. The three main defendants spoke of their liberal, secularist, pro-democracy backgrounds. NI, AA, and MA defended their appearances on the 14 July television programme, noting that this was a regular weekly magazine slot which invited a variety of commentators and intellectuals to discuss current affairs. Nothing had been said on the programme that could have been construed to support a coup, and none of them were aware that there was to be an attempted coup the next day.
43. Other defendants denied that the fact that they had salaries paid through Bank Asya, said to be associated with the Gulenist movement, meant that they were members or sympathisers. Furthermore, some of the accused denied that they had any important role in the impugned television adverts or that if they did contain "subliminal messages" in support of the coup – as alleged – they were certainly unaware of this. Connections made by phone data were explained by the fact that journalists speak with all manner of people in the course of their work. If some of those people were Gulenists that was unknown to the journalists, and in any event some of the named persons were equally associated with the ruling party. MA noted that if there were dollar bills at his home this was unsurprising given that he had travelled to about 40 countries in the course of his academic career.

Compliance of the proceedings with international fair trial standards

Many fundamental rights are formally protected under Turkey's Constitution¹⁸. In addition, Turkey acceded to the International Covenant on Civil and Political Rights (ICCPR) in 2003 and to the Optional Protocol allowing for individual complaint in 2006, the latter subject to the Reservation that the UN Human Rights Committee (HRC) will not be competent to consider complaints that have been, or are already under consideration by another international body. Turkey ratified the European Convention on Human Rights (ECHR) in 1954. The protection of fundamental rights is therefore provided for under domestic constitutional law and subject to obligations under the ICCPR and ECHR. In practice, international applications are usually made to the Strasbourg court.

A. The “State of Emergency”

Article 15(1) of ECHR

“In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.”

44. Following the coup, the President declared a ‘state of emergency’ pursuant to Article 120 of the Constitution and Article 3 §1(b) of the Law on the State of Emergency (Law No. 2935), and on 21 July 2016 notified the Council of Europe (CoE) that Turkey was to derogate from the ECHR, pursuant to Article 15¹⁹. Turkey is one of only eight countries to notify a derogation. Pursuant to Article 15, a member state can derogate only where a public emergency threatens the life of the nation and a formal ‘state of emergency’ has been declared. There can be no derogation from Article 2 (the right to life), Article 3 (the prohibition of torture) or Article 7 (no punishment without law), and a member state may only derogate from other Articles to the extent that any derogation is “strictly required by the exigencies of the situation”. In a subsequent statement, Turkey correctly recognized that derogation is not a suspension of rights but a limitation on certain rights as strictly necessary²⁰. Turkey has indicated to the CoE a number of

¹⁸ https://global.tbmm.gov.tr/docs/constitution_en.pdf

¹⁹

<https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2930086&SecMode=1&DocId=2380804&Usage=2>

²⁰

<https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2930086&SecMode=1&DocId=2380804&Usage=2>

extensions to the state of emergency and the general derogation but has not indicated any specific measures undertaken with respect to the derogation.

45. The case law indicates that the European Court of Human Rights (ECtHR) allows member states a significant margin of appreciation with respect to what constitutes a public emergency threatening the life of the nation, but will closely consider whether measures derogating from a Convention right are strictly necessary²¹.
46. Whereas it is arguable that some restrictions on freedom of expression might be permissible in the period following an attempted coup, extraordinary measures of detention and prosecution against journalists, beyond the existing criminal law, could not be justified. In its communications with the CoE, it is notable that Turkey has not yet sought to indicate that it has or will place restrictions on freedom of expression or derogate from international obligations in this regard. Indeed, none of the eight countries who have sought to derogate from parts of the Convention during public emergencies have sought to do so with respect to A10, freedom of expression.

Observations & Concerns:

47. In the immediate aftermath of the failed coup, BHRC noted its concern regarding the numbers of judges and prosecutors who were removed from office and detained²². Since that time, the numbers of judges, prosecutors, military and police officers, other public officials and academics removed from office have rapidly increased. Furthermore, the numbers of those dismissed, coupled with lawyers and journalists, who have been detained and prosecuted, has reached alarming levels. The belief of many observers is that the President and ruling AKP party have not simply pursued those who planned and executed the coup but have used it to 'purge' all of their opponents from public office and detain many of them and other opponents of the Government on false allegations of supporting the coup.
48. BHRC reiterates its initial concerns in light of the huge numbers of those who have now been removed from their positions and the large numbers who remain in detention facing trial. The Turkish state is fully entitled – indeed it has a duty – to ensure public safety in the wake of the failed coup. However, the fact that the state of emergency continues a year later, and the fact that so many have been removed from their positions and so many have been detained and charged with various offences raises serious questions over whether the President and ruling AKP party are legitimately dealing with the coup or whether they are abusing emergency powers to remove all opposition.

²¹ http://www.echr.coe.int/Documents/FS_Derogation_ENG.pdf

²² *supra*, fn 3

B. The Right to an independent, impartial and competent tribunal

Article 14 (1) ICCPR

“In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair... hearing by a competent, independent and impartial tribunal established by law.”

Article 6 (1) ECHR

“...everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...”

49. The right to an independent, impartial and competent tribunal is an absolute right that may suffer no exception. Independence presupposes a separation of powers pursuant to which the judiciary is institutionally protected from undue influence from the executive and legislative branches of government, as well as from other powerful figures or social groups, including political parties. The independence of courts and judicial officers must be guaranteed by the constitution, laws and policies of a country as well as being respected in practice by the government, its agencies and authorities, the legislature and the judiciary itself, in order to prevent abuses of power. Practical safeguards of independence, as set out in the Basic Principles on the Independence of the Judiciary, include the specification of qualifications necessary for judicial appointment, the need for guaranteed tenure, the requirement of efficient, fair and independent disciplinary proceedings regarding judges, and the duty of every State to provide adequate training to enable the judiciary to properly perform its functions.

50. Impartiality means that tribunals, courts and judges should have no interest or stake in the specific case they are examining, should hold no preconceived views about the matter they are dealing with and should refrain from acting in ways that promote the interests of any of the parties. It can properly be understood as the absence of bias, animosity or sympathy towards any of the parties. It has two elements, underscoring the fact that it is not sufficient for courts and judges to actually be impartial; they must also be seen to be so. First, judges must not allow their judgment to be influenced by personal or political bias or prejudice; they must not harbour preconceptions about the particular case before them; and they must not act in ways that improperly promote the interests of one of the parties to the detriment of the other. Second, the tribunal must also appear to a reasonable observer to be impartial and unbiased, in order to maintain public confidence in the judicial system. This is often expressed in the form of the maxim that ‘justice must not only be done; it must also be seen to be done’. There is an unacceptable appearance of bias (i) if “a judge is party to the case, or has a financial or

proprietary interest in the outcome of a case, or if the Judge's decision will lead to the promotion of a cause in which he or she is involved", or (ii) if "the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias"; i.e., "there should also be nothing in the surrounding circumstances which objectively gives rise to an appearance or a reasonable apprehension of bias".

The appointment of judges: observations and concerns

51. Consequent to the state of emergency the President issued a decree changing the composition of the committee that appoints judges²³ to shift the balance of appointment from the judiciary to the President himself – a change deprecated by the CoE²⁴.
52. A number of lawyers involved in the instant trial asserted that new judges being appointed to replace those removed are being chosen by their political allegiance. Irrespective of the accuracy of that claim, the move from an independent judicial commission to a process of political appointment will plainly facilitate patronage and the appearance of politicisation of the judiciary, and, at minimum, undermine confidence in due process and the rule of law.
53. A key feature of the above question involves the removal of thousands of judges from office. Given the required impartiality and independence of the judiciary²⁵, there are competing factors here. On the one hand it is right that judges who can be proven to have acted corruptly in support of an attack on the constitution and democratic state should be removed and indeed prosecuted. On the other, the key importance of the independence of the judiciary requires that judges should only be removed from office on clear evidence and through a transparent process.

The relationship between the judges and the prosecutor: observations and concerns

54. In observing the trial, it was noted that the presiding Judge commenced the proceedings with a lengthy summary of the allegations in the indictment. Each defendant was then given the opportunity to present her or his oral and written statements. Although the Judge did request one of the defendants to avoid repetition he did not limit the time available for their evidence which inevitably

²³ High Council for Judges and Prosecutors (HSYK)

²⁴ <http://www.hurriyetdailynews.com/council-of-europe-says-new-turkish-judicial-body-does-not-offer-judicial-independence.aspx?pageID=238&nID=114066&NewsCatID=351>

²⁵ UN Basic Principles on the Independence of the Judiciary, Principle 1

went on for some time. After each defendant's evidence the court permitted supplementary questions by defence counsel and at the end of the five days of the hearing defence counsel were able to make full submissions on the indictment and on whether the defendants should remain in detention, pending the next stage of the proceedings. These features gave the appearance of a functioning fair procedure.

55. On the other hand, there were aspects of the hearing, which did raise concerns. The prosecutor sat at the same level as the judges and in similar robes, the presiding Judge, rather than the prosecutor, summarised the indictment and allegations. These aspects gave the impression of inappropriate proximity between the judges and the prosecution.

56. It is common in some jurisdictions for prosecutors to play a judicial function, but there must be a clear separation of roles at trial. It is axiomatic that a fair trial involves an independent and impartial judiciary, in particular where the judges are the finders of fact. The prosecutor did not address the court concerning the indictment or allegations, ask the defendants any questions or make any oral submissions. The appearance of the proceedings was that the prosecution and judges were acting in concert with no separation of function.

C. The Right to Legal Assistance without Undue Delay

Article 14(3)(d) ICCPR

“In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: ...

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.”

Article 6(3) ECHR

“Everyone charged with a criminal offence has the following minimum rights:...

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require...”

57. Everyone has the right to defend himself/herself in person or to appoint a lawyer of his/her own choice in order to ensure an effective defence. That right arises from the moment the suspect is first taken into custody upon arrest, to proceedings before the court before which, “the accused or his lawyer must have the right to act diligently and fearlessly in pursuing all available defences and the right to challenge the conduct of the case if they believe it to be unfair”.

58. Access to a lawyer is one of the most basic safeguards of a detainee’s rights, and one of the most effective. The risk of ill-treatment is substantially heightened by the lack of access to lawyers and a lack of independent supervision of conditions of detention. Indeed, even short periods of incommunicado detention or delay in allowing access to lawyers have been held by Strasbourg to be a violation of Article 5(3)(4) ECHR and by the UN Human Rights Committee (HRC) to be a violation of Article 9(3)(4) of the ICCPR. Likewise, delays in bringing a detainee before a court removes any effective means to challenge the legality of detention, and is therefore also in breach of international law: Article 5(3)(4) ECHR and Article 9(3)(4) ICCPR.²⁶

Observations and Concerns:

59. BHRC understands from defence lawyers that under the state of emergency those

²⁶ *Brogan v UK* (1989) 11 EHRR 117, *Ocalan v Turkey* (2003) 37 EHRR 10, *Yaman v Turkey* [2005] 40 EHRR 49, Concluding Observations on Spain (1996) UN doc CCPR/C/79/Add.61, para 12 and: *Hammell v Madagascar* (155/83).

arrested are held for significant periods of time without access to lawyers and longer periods before they are brought before a judge.

60. BHRC is concerned that those detained in the aftermath of the coup are being denied initial access to lawyers for significant periods, and they are not being brought before a court to authorize detention for 12 days. As stated above, access to lawyers is a key safeguard against the ill-treatment of detainees and without such access they are effectively unable to challenge the validity of their detention, potentially raising breaches of Article 3 and Article 5(3)(4) ECHR.

61. The defence lawyers have indicated that once the case was disclosed to the accused, their right of confidential access to lawyers was impeded by the requirement that their privileged statements had to be passed through the state authorities to their own lawyers. This is a further breach of Article 6 and indeed, Article 8 of ECHR²⁷.

²⁷ *Golder v UK (1979-80) 1 EHRR 524*

D. The Right to Adequate Time and Facilities to Prepare a Defence

Article 14(3)(b) ICCPR

“In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:...

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing.”

Article 6(3) ECHR

“Everyone charged with a criminal offence has the following minimum rights:...

(b) to have adequate time and facilities for the preparation of his defence...”

62. The right to adequate time and facilities for the preparation of a defence applies not only to the defendant but to his/her defence counsel as well and is to be observed in all stages of the proceedings. What constitutes “adequate” time will depend on the nature of the proceedings and the factual circumstances of a case. Factors to be taken into account include the complexity of a case, the defendant's access to evidence and any time limits provided for in domestic law for various stages in the proceedings.

63. The right to adequate “facilities” requires that the accused should have the ability to communicate, consult with and receive visits from his/her lawyers without interference or censorship and in full confidentiality. The accused and his/her lawyers must also be guaranteed timely access to all appropriate information, documents and other evidence on which the prosecution intends to rely, as well as all exculpatory materials in their possession, which would tend to establish the innocence of the accused or could assist his/her defence in any way.

64. The right to know the basis upon which charges are based, follows from the right of access to lawyers, and similar violations of Article 5 and Article 6 ECHR and Article 14(3) ICCPR may occur where there is undue delay.

Observations and Concerns:

65. In this case, although the accused were informed of the general nature of the allegations against them, it was not until shortly before the trial commenced that they were apprised of the indictment and the prosecution case. It is plainly impossible to effectively challenge detention without knowing the basis for the detention, and late disclosure of the case file inhibits the ability of the defence to properly prepare for trial²⁸.

²⁸ *Dowsett v UK* [2004] 38 EHRR 41 at [41] and HRC General Comment 32(90) at [33]

66. In the instant case, defence lawyers stated that there was no disclosure of the case or the particular allegations at the interrogation stage, the lengthy and complex indictment and the case file was not provided to the accused until about 6 weeks before trial, and the facilities of preparation for trial were limited to 1 hour legal visits and included the requirement that defence statements were passed through the prison administration and were held up for 25 days. Cumulatively these matters raise potential breaches of Article 5(4) and Article 6 ECHR.
67. Lack of access to lawyers or inadequate access for the purposes of trial preparation may also constitute violations of Article 6(3) ECHR and Article 14(3) ICCPR²⁹.

²⁹ Luchaninova v Ukraine, No. 16347/02 at [60-67], Salduz v Turkey (2009) 49 EHRR 19, and Kelly v Jamaica (537/93), Gridin v Russian Federation (770/97) and Concluding Observations on the UK (2008) UN doc CCPR/C/GBR/CO/6 T [19]

E. Specificity of charges and sufficiency of evidence

Article 6(3) ECHR

“Everyone charged with a criminal offence has the following minimum rights:
(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him...”

In the Turkish system, the indictment sets out not only the offences charged but also an exposition of the evidence upon which the prosecution relies. .

The Indictment: Observations and Concerns

68. In the instant case, defence lawyers have challenged the ambit of the offences themselves and argued that the alleged criminal charges are insufficiently precise.
69. The indictment in this case is striking for its concentration on details of the failed coup. In contradistinction, the summaries of the nature of the alleged criminal activities and evidence against each defendant are extremely short and vague.
70. The defence has argued that the ambit of the charges is too widely drawn to give sufficient specificity as required by law. Whereas it is correct that the charges lack a temporal ambit, BHRC suggests that the problem is not so much the *form* of the indictment but the attempt to include evidence which is temporally far too removed from the coup. Many of the events to which the earlier evidence relates were many years before the Gulenist movement was made illegal and at a time when it was in alliance with the governing AKP.

Lack of a Prima Facie Case: Observations and Concerns

71. The defence lawyers have also argued that the evidence said to make out the charges does not constitute a *prima facie* case. BHRC notes that the reading and summary of the indictment highlighted clear evidential deficiencies.
72. In essence, the charges against the accused amount to different aspects of a generalised coup conspiracy. Given the known facts about 15 July 2016 there was plainly a concerted attempt to take over the state by force and therefore the prosecution will have little difficulty in proving conspiracy: indeed none of the accused are denying there was such an attempted coup.
73. The real issue is whether any of them were a part of the plot or played any role in it. The particulars of the cases against the defendants have been summarised

above, and the evidence against each of the accused is sparse. There are no allegations of any active participation in the coup. There is no allegation that any of these defendants took part in planning for the coup. It is suggested that an inference can be drawn from the 14 July 2016 television programme that NI, MA and AA knew that the coup was about to happen and relies heavily upon a suggestion that an intellectual discussion on a minor and entirely legal television channel sent “subliminal messages” to plotters.

74. The prosecution case does not begin to set out what the impugned messages were, what their alleged meaning and purpose was, or to explain why communication between plotters should have been by “subliminal” broadcast rather than simple messaging. The allegations are not merely surprising and bereft of particularity but challenge logic in an age of social media.
75. Furthermore, the defendants are charged with either membership of or supporting a “terrorist” organization yet the evidence to characterize FETO as such an organization relates to a period long after much of the evidence said to link defendants to it.
76. In respect to allegations of links to terrorism, the prosecution assert that there is evidence of:
 - a. Association with known Gulen supporters, in particular from telephone data. NI (in particular) did not deny such contact but noted that the individuals referred to had associated with members of the Government at the relevant times and that the job of journalists was to maintain contact with a wide variety of people. None of the contact alleged was proximate to the time of the coup. Whereas contact evidence may support conspiracy charges, context is vital; journalists are expected to communicate with persons from different standpoints. Association does not imply or even raise the suspicion of collaboration.
 - b. Association with the Gulen movement on the basis that some of the defendants held accounts at Bank Asya. Whatever was the connection between Bank Asya and Gulen, it had been a legitimate high street corporation until six days after the attempted coup when the state cancelled its banking licence and seized its assets³⁰. The relevant defendants asserted that salaries were paid through these accounts and no link to Gulen or terrorism therefore follows.
 - c. Association with the Gulen movement by possession of \$1 bills. This allegation is particularly made against MA. He responds by asserting that as an academic he has travelled to about 40 countries and it is hardly

³⁰ <http://aa.com.tr/en/economy/turkey-bank-asyas-banking-license-cancelled/613864>

surprising if he has some US currency. To this it should be added that an internet search will readily reveal that a number of currencies other than the Lira are widely accepted in Turkey, including the dollar.

- d. Newspaper articles falsely alleging corruption against military officers as part of a plot to remove and replace them with Gulenist officers. This is an allegation primarily although not exclusively leveled against AA and MA. If it could be proved that they wrote articles which they knew to be false, with the intention of causing innocent officers to be removed from their positions, investigated and charged with corruption offences, then of course they could be properly indicted for perverting the administration of justice. Furthermore, if it could be proved that such false reporting was part of a coup plot, then they would indeed have a case to answer on conspiracy. However there appear to be a multiplicity of difficulties for the prosecution here. Firstly, these articles pre-date the attempted coup by several years. To include these allegations in the coup conspiracies would massively extend their ambit and include periods before Gulen fell out with the government itself. Secondly, the indictment does not indicate on what basis the prosecution say that the articles were false, or that the defendants knew them to be so. The indictment merely relies on the fact that the officers were acquitted on appeal. An acquittal is not evidence that an allegation is false, it simply means that the allegation was not proved to the satisfaction of the court. Perhaps more importantly given that the defendants are journalists, there is no explanation as to how the prosecution seek to prove that AA, MA or any of the defendants knew that the allegations were false. Although journalists are not generally immune from defamation actions there is a strong presumption in Article 10 and Article 19 that journalists should not be criminally pursued for assertions that turn out to be wrong: journalists must be given substantial latitude to investigate, comment and proffer opinion, without the chilling effect of sanction or harassment on account of anti-establishment opinion or even where they are duped into factual inaccuracy. This part of the case raises stark issues of press freedom.
- e. Prior knowledge of the attempted coup and “subliminal messages” contained in the 14 July broadcast. Although this allegation at least relates to a broadcast proximate to the coup it attracts the same issues as the false article ‘evidence’. Firstly, the prosecution fails to set out exactly what in the broadcast proves prior knowledge. Secondly, as stated above, the prosecution fails to set out what the “subliminal messages” are and what they were intended to do. In a world of social media it is inherently unlikely that coup plotters would be receiving messages or a trigger through a weekly magazine programme on a legal and registered TV channel, via journalists and academics discussing the issues of the day. The three defendants relevant to this allegation indicate that there was mention of a coup in the 1960s and criticism of the current president during the broadcast, but they all vehemently deny supporting any coup, current or historic. The same strong Article 10 and Article 19 safeguards in favour of

- journalists applies as with the impugned written articles.
- f. Some of the defendants were involved in TV adverts for the *Zaman* newspaper. It is understood that this allegation relates to a series of TV adverts made some 9 months before the attempted coup. Once again, the prosecution has not made clear in the indictment what relevance these adverts are said to have to the coup.
 - g. MA attended a conference following which police officers loyal to Gulen conducted an investigation against the Foundation, and that investigation did not include him. The prosecution appears to suggest that an inference can be drawn that MA was not investigated because he was connected to Gulen. In his defence statement MA describes the conference as one of hundreds he was invited to by people of diverse viewpoints and attended as an intellectual, writer and journalist.

77. This stage of the trial included the lengthy summarisation of the indictment and allegations, and the statements of each defendant. The prosecution had the opportunity to question the defendants but chose not to do so. Given that the trial continues, a definitive view cannot be given regarding the evidential sufficiency for the charges. However, for the reasons referred to above, it is not difficult to see why the defence lawyers have argued that there is no *prima facie* case against any of these defendants.

78. The apparent insufficiency of evidence in this case also raises important issues regarding pre-trial detention.

F. Right to an Open Trial

Article 14 (1) ICCPR

“In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a public hearing... The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice...”

Article 6 (1) ECHR

“...Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”

79. The right to a public hearing is an essential safeguard of the fairness and independence of the judicial process, guaranteed in all but a limited number of narrowly defined circumstances. All trials in criminal matters must therefore, in principle, be conducted orally and publicly, in order to ensure the maximum amount of transparency.

80. Given that the holding of a public hearing provides an important safeguard not only for the interest of the individual but also for the interest of society at large, which has the right to a transparent and accountable system of justice, courts must make information regarding the time and venue of the oral hearings available to members of the public, so as to enable their attendance. Courts must also provide adequate facilities for the attendance of interested members of the public, within reasonable limits, taking into account the potential interest in the case and the duration of the oral hearing. With regard to courtroom space, courts should conduct hearings in courtrooms that are able to accommodate the expected number of persons, depending on the foreseeable level of public interest. Failure reasonably to provide an adequate sized-room, or otherwise to provide for public access to court proceedings will almost certainly constitute a violation of the right to a public trial, although there will be no violation, “if in fact no interested member of the public is barred from attending”.³¹

³¹ Van Meurs v the Netherlands, UN Human Rights Committee Communication 215/1986.

Observations and Conclusions:

81. Despite the fact that this is a trial involving a significant number of defendants and which is taking place in the largest court complex in Europe³², BHRC notes that the physical arrangements for the trial were far from ideal for family members, consulate officials, international legal observers, NGOs and journalists.
82. The trial was listed in a court that could accommodate only about 30 people in its public gallery. For part of the first day and the second day of the trial, the case was moved to a larger court room but was then returned to the initial one. Despite a specific request, the court declined to allow international legal observers to sit in empty seats in the body of the court, which left observers in the unhappy position of potentially competing with family members for access. Consular officials and journalists were, likewise, only allowed access to the general public gallery. BHRC had written to the Turkish Justice Department in advance of the trip advising of the attendance of an observer and asking whether he could meet with the Judges as a courtesy, and with the prosecution to discuss aspects of the case. No acknowledgement or reply has been received. In addition, BHRC spoke directly with the court officer and attempts were made through defence counsel for communication with the prosecutor.
83. The failure to make proper arrangements for general attendance at a trial attracting such public interest and the failure to provide facilities for observers, consular officials and journalists, creates an impression that the court does not welcome independent scrutiny.
84. If the prosecution and judicial systems are upholding high standards and complying with Turkey's international obligations it should be expected that access to the court and the process would be given some priority. Likewise, it is disappointing that the Department of Justice did not reply to our written communications prior to the observation or at all. In conducting an observation BHRC would have been greatly assisted in speaking with the Justice Department and prosecutors.

³² The Istanbul Çağlayan Justice Palace

G. Restrictions on Freedom of Expression

Article 19 (2) ICCPR

“Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”

Article 10 (1) ECHR

“Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers...”

85. Freedom of expression is protected in Turkish law: Article 26 of the Constitution³³, and under Turkey’s international obligations: Article 19 of the ICCPR and Article 10, ECHR. In addition, Article 148 of the Constitution enables reliance on ECHR rights in the Constitutional Court.

86. Under both domestic and international law, freedom of expression is a qualified right, it is subject to permissible restriction where prescribed by law and where necessary in a democratic society to respect the rights and reputation of others, national security, public order or public health and morals: Article 10(2) ECHR and Article 19(3) ICCPR. Case law in Strasbourg and the UN Human Rights Committee (HRC) indicates that permissible restrictions on freedom of expression are strictly construed and limited³⁴.

87. The strict position that qualified rights, including freedom of expression, cannot be limited for any other purpose, is further strengthened by the ‘misuse of power’ prohibitions: Articles 18 ECHR and Article 5 ICCPR³⁵. Whereas the permissible limitations in the relevant articles are exclusive, meaning that a limitation permissible for one right cannot authorize a restriction on another right where such is not expressly provided, Articles 18 and Article 5 further prohibit limitations applied for an ulterior motive. Cases where the Strasbourg court has

³³ https://global.tbmm.gov.tr/docs/constitution_en.pdf

³⁴ *Prager and Oberschlick v Austria* (1995) 21 EHRR 1 at [34], and *Radio France v France* [2005] 40 EHRR 29, [32-33, 37] and *HRC General Comment 34(102)* at [13 et seq]

³⁵ *HRC General Comment 34(102)* at [21]

found a violation of Article 18 include a finding that detention was to punish an accused for her lack of respect for the court and to silence or punish a person for criticism of the government³⁶.

88. A journalist is subject to the same criminal laws as anyone else, however, his/her work will raise important safeguards, which protect him/her from prosecution: journalists are afforded substantial protection by Article 10 subject to the proviso that they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism³⁷. An assertion that incites or promotes a criminal act and is intended so to do will not be immune from prosecution simply because it is done by a journalist, however, contact with someone contravening the law or reporting upon acts which may be criminal in nature, or providing an opinion is completely different³⁸. Not only does the media have the right to seek out and report on events and ideas that are of public interest but the public also has the right to receive that information³⁹.

Observations and Concerns:

89. BHRC spoke with lawyers, defendants and family members involved with other extant journalist cases. We were informed that the charges, allegations and evidential basis of these other cases are similar to the instant case. The repeated assertion is that these prosecutions are designed to interfere with freedom of expression in Turkey and to use legitimate public sentiment against the attempted coup to remove all opposition to the Government.

90. In these cases and those of other detained journalists the common denominator does not appear to be allegiance to the coup (although that may be the case in some instances) but criticism and opposition to the President and the ruling AKP party.

91. In the instant case the indictment does not indicate that there is evidence of activity which was intended to aid the coup, it indicates wide ranging assertions that reporting and opinion by NI, MA and AA, and adverts produced by other defendants, in fact assisted the activities of the alleged plotters. The distinction is critical. The rest of the allegations relating to the specific defendants appear to relate to very weak association evidence.

92. The closure of media outlets, blocking of websites and mass arrests of journalists indicates that free expression is being curtailed not because of a permissible restriction under Article 10(2) but as a campaign against journalists critical of the government and the President, designed to remove all opposition debate and

³⁶ *Tymoshenko v Ukraine* [2014] 58 EHRR 3, and *Ilgar Mammadov v Azerbaijan*, No. 15172/13 [137-143]

³⁷ *Radio France* (above cit) at [37]

³⁸ *Erdogdu v Turkey* [2002] 34 EHRR 50, [51-73]

³⁹ *Handyside v UK* (1979-80) 1 EHRR 737 at [49], *Axel Springer AG v Germany* (2012) 55 EHRR 6 at [79]

comment: the lifeblood of a functioning democracy.

93. These prosecutions do not therefore only violate freedom of expression, contrary to Article 10 ECHR and Article 19 ICCPR but there is the strongest of inferences that they are based upon an improper motive and therefore amount to an abuse of power contrary to Article 18 and Article 5.

Conclusions & Recommendations

94. The *Altan and Others* prosecutions have the appearance and character of a 'show trial' intended to suppress freedom of expression in Turkey and to remove essential journalistic safeguards, which are fundamental to democracy.
95. Given the context referred to above – in particular the number of other journalists detained and awaiting trial – it is clear that this trial is but one of many.
96. Turkey is a sophisticated, modern democracy that signed and acceded to the ECHR and ICCPR many years ago. The government argues, with some force, that the attempted coup was a major challenge to the state. However, the response to the coup – the mass detentions and trials, the huge number of dismissals, the continuance of the state of emergency, changes to the constitution to vastly increase executive power, and the suppression of opposition – has done precisely that which the government charges the alleged plotters: diminished the rule of law and substantially undermined the democratic institutions.
97. BHRC urges the government and judiciary (where appropriate) to:
 - a. Honour its constitutional and international commitments to the rule of law and fundamental rights and protections;
 - b. Re-evaluate whether the state of emergency remains necessary,
 - c. Introduce measures to reinstate the independence of the judiciary and prosecuting service.
 - d. Release all detainees and discontinue charges unless there is clear and substantial evidence of actual criminality.
 - e. Make a public commitment to ensure that freedom of expression is robustly protected and that journalists will be safeguarded from arrest and prosecution for investigating, reporting and commenting on issues of the day.