BAR HUMAN RIGHTS COMMITTEE OF ENGLAND & WALES

TRIAL OBSERVATION INTERIM REPORT

Şahin Alpay & others v Turkey
***Zaman* Newspaper: Journalists on trial**

June 2018

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ARTICLE 19

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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. Its membership is comprised of barristers practicing at the Bar of England and Wales, legal academics and law students.

BHRC aims to:

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

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

Executive Summary

BHRC conducted a trial observation in Turkey in May and June 2018 at the closing stages of a trial in which terrorism charges have been levelled against 11 Defendants, 10 of whom worked, or wrote opinion pieces, for *Zaman* newspaper, in their capacity as journalists

The Turkish daily newspaper *Zaman* was previously the most widely distributed newspaper in Turkey. Until its takeover by the Government in March 2016, its editorial line was viewed as being favourable to Fethullah Gülen, an exiled Turkish citizen and preacher who now lives in the United States. He is considered by the Turkish state to be the leader of an organisation known as FETÖ/PDY ("Gülenist Terror Organisation/Parallel State Structure") whom it holds responsible for the violent attempted coup. It was closed down by the national authorities soon after the failed coup attempt on 15 July 2016, following the declaration of a national state of emergency.

All but one of the Defendants were journalists who wrote for *Zaman*, many of whom are also academics. One Defendant, Orhan Kemal Cengiz, is an experienced human rights and constitutional lawyer who represented *Zaman* before Turkey's Constitutional Court, and has appeared in cases against Turkey in the European Court of Human Rights. At the date of this report, four of the 11 Defendants remain in pre-trial detention at Silivri prison[1] where they have been held for almost two years.

The charges against these individuals, variously and principally, relate to the following provisions of the Turkish Criminal Code ("TCC"):

- Membership of a terrorist organisation (TCC 314/2)
- Attempting to overthrow the constitutional order (TCC 309/1)
- Aiding a terrorist organisation without being a member (TCC 220/7)
- Propaganda for a terrorist organisation (Article 7(2) of Law 3713)

Two final days, 5 and 6 July 2018, are reserved for completing defence statements, deliberation and handing down of verdicts. Accordingly, this is an interim report and it follows that BHRC must adopt a note of caution in its conclusions, as the trial has not yet concluded and the outcome must not be prejudged. On the basis of the material and observations it has conducted so far, BHRC considers that there are likely to have been violations of Articles 5, 6 and 10 of the European Convention of Human Rights (ECHR), and the parallel rights under the ICCPR, relating to the liberty and security of these defendants, their right to a fair trial and their right, as journalists and lawyer, to freedom of expression.

[1] The following defendants were released from pre-trial detention following successful applications on their behalf at the close of proceedings on 11 May 2018: Ali Bulaç, Mehmet Özdemir and Şahin Alpay.

There are serious procedural flaws which have emerged over the course of these two observations. In particular, BHRC considers that these flow from the acute lack of specificity in the allegations which give rise to terrorism charges, in respect of which aggravated life sentences are being sought. The indictment focuses broadly on FETÖ/PDY as a terror organisation, and the role allegedly played by *Zaman* in becoming part of its media arm. The charges largely appear predicated on the basis that anyone who wrote for *Zaman*, in any capacity, may be guilty by association.

In that vein, no proper or serious attempt has been made to causatively link the charges with the allegations against the Defendants being tried. The allegations relate largely to opinion columns or statements expressed in the public arena, through television broadcasts and social media. Such opinion pieces are the product of political commentators and form part of extensive archives of criticism and comment. The comments relied upon by the Prosecutor appear to have been cherry-picked, without analysis, consideration or even provision of the whole article or comment piece. Isolated words or phrases are picked out seemingly without any context. Moreover, the majority of the articles were written or relate to events which took place in late 2013 and 2014, in the aftermath of a corruption scandal which broke in December 2013, in which (then) Prime Minister Erdogan and his family were implicated. None of the articles relied upon by the Prosecutor appear to relate to the period after which FETÖ/PDY was proscribed as a terror organisation. In the case of Defendant Orhan Cengiz, the lawyer, no allegations appear on the face of the indictment and there is a serious concern he has been charged simply by reason of accepting instructions to act as *Zaman*'s lawyer before the Constitutional Court.

There are also serious procedural shortcomings which relate to the presentation of, and reliance upon, extensive evidence by the Prosecutor in his Final Opinion which was not specified in the indictment, following the close of the prosecution's case, and which has not formed the basis of any adversarial examination. The Defendants had to contend with addressing considerable volumes of evidence in a very short period of time, presented in an inadequate format, and which they were required to address for the first time in their defence closing statements..

Unusually, one of the Defendants, Şahin Alpay, has had the lawfulness of his pre-trial detention, tested before the Turkish Constitutional Court, and the European Court of Human Rights (ECtHR). In considering that question, the Constitutional Court considered the nature of the evidence against Alpay, and its assessment was accepted by the ECtHR. The Constitutional Court found that the investigating authorities had been unable to demonstrate any factual basis that might indicate that the applicant had been acting in accordance with the aims of FETÖ/PDY. It added that the fact that he had expressed his views in *Zaman* could not in itself be deemed sufficient to infer that the applicant was aware of that organisation's goals. Accordingly, it concluded that "strong evidence that an offence had been committed" had not been sufficiently established in Şahin Alpay's

case. Notwithstanding that the Prosecutor has sought to rely on further evidence subsequent to these judgments, these conclusions have strong implications for all of the Defendants in the *Zaman* hearing

Moreover, there are no sufficient attempts made by the Prosecutor to demonstrate that the articles written by the Defendants even incited the use of force and violence, still less that the Defendants applied force and violence in the attempted overthrow of the Government. No evidence whatsoever has been relied upon to demonstrate that the Defendants knew of the plan to mount a coup attempt, or that they were part of such an attempt. Nor has any serious or proper evidence been led to demonstrate that they were members (or in two cases, alleged leaders) of an armed terrorist organisation.

BHRC observes that the same generic hallmarks which have been relied upon by the Turkish authorities in similar prosecutions after the coup attempt, have been relied upon against some defendants. For example, in a few instances, the allegations amount to the holding of a bank account in BankAsya, which was at the material time a legitimate financial and banking institution in Turkey; or the presence of Bylock on a smartphone, an encrypted messenger app available worldwide on smartphones. These hallmarks are highly problematic and do not meet the requisite standard of proof that is required to meet such serious charges.

BHRC observes that the paucity of the Prosecutor's evidence, raises the likely inference that there is no prima facie case against these Defendants, leading to the likely conclusion that these charges should never have been brought at all. Placing this in the context of the very tight and broad clampdown on civil society, journalists, lawyers, academics and judges that has taken place since the coup attempt, BHRC observes that it is indeed plausible that these charges are politically motivated. At the very least, they represent a grave incursion into freedom of expression and freedom of the press in Turkey. BHRC recalls that recent judgments of the Turkish Constitutional Court and the European Court of Human Rights, including in respect of Defendant Alpay, have warned that the prosecution and detention of journalists for their views can create a chilling effect on freedom of expression, which is a cornerstone principle within a functioning democracy.

The paucity of the evidence also raises the very real concern that the defendants have been arbitrarily deprived of their liberty, at differing stages over the course of the last two years. Four defendants remain in pre-trial detention. In light of the decision to release Ali Bulaç on 11 May 2018, there appears to be no good reason why the remaining four Defendants, as frail and in ill-health as they appeared in court to be, should not also have been released on the same grounds either on that occasion or subsequently. No proper reasoned decision was provided by the Court as to why these Defendants should remain in detention, nor why other less drastic measures did not constitute suitable alternatives.

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 detained. 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.

BHRC therefore urges the Turkish authorities to consider both whether the continued prosecutions of these Defendants, and the continued detention of four of them, are in the public interest and should be pursued. BHRC also calls on the Turkish authorities to ensure that all lawyers in Turkey are provided with the protection and guarantees required to carry out their functions as provided for in the UN Basic Principles on the Role of Lawyers. Further, BHRC urges the authorities, and in particular the court, to honour their constitutional and international commitments to the rule of law and fundamental rights and protections, including freedom of expression

Introduction

1) On 10-11 May and 7-8 June 2018, BHRC Vice-Chair Schona Jolly QC attended the closing stages of the trial of 11 Defendants who had worked in different capacities for the Turkish newspaper *Zaman* ("the *Zaman* trial"). All but two of the 11 Defendants and their lawyers have now given their closing statements. Four of the Defendants remain in pre-trial detention at Silivri prison, outside Istanbul. Verdicts are expected to be delivered, following deliberation, at the conclusion of the remaining defence statements on 5-6 July 2018. This report provides an interim summary of the serious concerns raised by these two observations.

Terms of Reference, Funding and Acknowledgements

2) BHRC was asked by ARTICLE 19 (an independent not-for-profit organisation dedicated to the promotion of freedom of expression in the pursuit for fundamental rights) to observe the trial. BHRC now shares a Memorandum of Understanding with ARTICLE 19, created in response to the deterioration in freedom of expression in Turkey. BHRC was funded by ARTICLE 19, through the financial assistance of the European Union, to carry out both trial observations which are the subject of this report. BHRC, however, conducted the trial observations and wrote this report on a pro bono basis. BHRC is grateful for the assistance provided by ARTICLE 19 in arranging the observations, in providing the services of a professional interpreter throughout the hearings, and in providing translations of written material as required. For the avoidance of doubt, nothing in this document should be regarded as reflecting the position of the European Union.

Previous Trial Observations in Turkey

3) The mission builds upon BHRC's previous trial observations to assess and report on the compliance of the Turkish courts with international fair trial standards in cases concerning journalists who were charged with serious terrorism offences in the wake of the failed attempted coup in July 2016. Grainne Mellon attended part of the trial of journalists from the *Taraf* newspaper in September 2016[2], and Pete Weatherby QC attended and reported on the trial of *Altan and Others v Turkey* in 2017[3], in which 17 journalists and other media workers were charged with serious offences relating to the failed coup.

[2] http://www.barhumanrights.org.uk/wp-content/uploads/2017/02/BHRC-statement-on-Taraf-journalists.pdf
[3] http://www.barhumanrights.org.uk/bhrc-finds-violations-of-fair-trial-rights-in-turkey/

Background

4) The Turkish daily newspaper *Zaman* was previously the most widely distributed newspaper in Turkey[4]. Until its takeover by the Government in March 2016[5], its editorial line was viewed as favouring Fethullah Gülen, an exiled Turkish citizen and preacher who now lives in Pennsylvania in the United States of America. He is considered by the Turkish state to be the leader of an organisation known as FETÖ/PDY ("Gülenist Terror Organisation/Parallel State Structure") whom it holds responsible for the failed attempted coup.

5) On the day after the failed coup attempt, the national authorities publicly blamed the Gülenist organisation for orchestrating the coup. Shortly thereafter, the Gülenist organisation was proscribed as a terrorist group[6]. *Zaman* was closed down soon after by the national authorities, following the declaration of a state of emergency in Turkey.

6) The Gülen movement previously worked closely with the ruling AK Party but the relationship soured following a series of high profile events in 2013. Gülen criticised the Government's response to the Gezi Park protests, and in response, (then)Prime Minister Erdogan threatened to close Gülen's large network of schools. In December 2013, a major corruption scandal broke when police made coordinated raids on officials and the owner of a bank. Prime Minister Erdogan and his family were implicated in the scandal and the Government publicly blamed the Gülen movement for orchestrating it through its members in the police force. Although the movement was not officially designated as a terrorist organisation until summer 2016, the Prime Minister began to refer to the Gülen movement as a terrorist organisation shortly after the 2013 corruption scandal. The scandal subsequently became a key focus of *Zaman* journalism. Many of the journalists

[4] It formed part of the wider Feza media group.

[5] Constanze Letsch, 'Seized Turkish opposition newspaper toes government lines', *the Guardian* (6 March 2016), available at <https://www.theguardian.com/world/2016/mar/06/seized-turkish-opposition-newspaper-zaman-erdogan-government> (last accessed 22 June 2018). *See also* https://www.ft.com/content/417e5628-e225-11e5-8d9b-e88a2a889797

[6] There is a lack of clarity over the exact status of FETÖ/PDY as a proscribed terror organisation. Several of the defendants' lawyers informed BHRC (and some made legal submissions to this effect), that until there was an appellate court decision declaring it a terror organisation, it was not so recognized in law. BHRC understands from the lawyers that the Gülen movement was recognised as a terrorist organisation by a court for the first time in a judgment of the Erzincan Heavy Penal Court on 16 June 2016 (not an appellate decision). The indictment refers to National Security Council meetings which took place between 26 February 2014 and 26 May 2016 where the Gülenist movement was acknowledged as a threat to national security and public order. BHRC also had the opportunity to ask the Prosecutor about the proscribed status of FETÖ/PDY. No clear answer was forthcoming. The Prosecutor stated there was no need for a Supreme Court decision and that it was sufficient that there was a National Security Council decision, which BHRC has learned was likely taken in May 2016, which proscribed the organisation as a terror organisation.

charged in the *Zaman* trial wrote opinion pieces on this subject, and these articles appear to be the basis of many of the charges against the accused in the trial.

7) Most of the Defendants were taken into police custody on around 26 July 2016 and brought before a magistrate within a few. Although at first most of the Defendants were denied bail, gradually some of them have been released. On 11 May, Ali Bulaç, Mehmet Özdemir and Şahin Alpay were conditionally released, the latter from house arrest. To date, four remain in detention. Throughout the duration of their pre-trial detention, each of the Defendants' lawyers have made repeated applications for their release, including at the last court hearing. These applications were all denied.

8) The indictment was filed on 10 April 2017. The Defendants were suspected of being part of the FETÖ/PDY media network, and they were accused variously, and pursuant to Articles 309, 311, 312 and/or 314 in conjunction with Article 220 § 6 of the Turkish Criminal Code ("the TCC"), of attempting to overthrow the constitutional order, the Turkish Grand National Assembly and the Government by force and violence, and of committing offences on behalf of a terrorist organisation without being members of it. The Public Prosecutor sought three aggravated life sentences and for most/all? Of the other Defendants, a sentence of up to 15 years' imprisonment.

Hearings Observed

9) The trial was intended to be completed on 10-11 May, with all 11 Defendants and their lawyers making their closing statements, followed by deliberation and verdicts. However, the statements were frequently lengthy and no attempt was made by the Court to impose any time limits. In the circumstances, the trial was adjourned until 7-8 June 2018 when it was intended that the defence statements would be completed and verdicts handed down. However, again that did not happen and there remain two Defendants, Şahin Alpay and İhsan Dağı whose closing statements have not been heard. Those are scheduled to be heard, followed by verdicts on 5-6 July 2018. BHRC has had the opportunity to speak to both remaining Defendants to understand the nature of their final defence.

Meetings Undertaken

10) The trial observer had the opportunity to meet with a number of officials and stakeholders in order to have the opportunity to gain as much insight as possible into the criminal proceedings. She met with:

(a) Most of the Defendants who were not detained;
(b) Members of the Defendants' families;

(c) Members of the defence legal team;
(d) The Prosecutor;
(e) Two of the judges trying the case, including the President of the panel.
(f) Members of civil society, including representatives of Human Rights Watch, P24, Reporters without Borders, and Article 19;
(g) Diplomatic representatives including the Swedish Consul-General and representatives from the British Consul, Norwegian Consul and EU Mission in Ankara.

The 11 Defendants

11) The indictment initially listed 30 Defendants, and then added one additional Defendant. However, at a hearing on the 5 April 2018, the Prosecutor took the decision to split the Defendants, so that the journalists (and one lawyer) became a separate tranche from those who worked in administrative or executive positions within *Zaman* or Feza media group. BHRC observed the closing statements of the journalist tranche only.

12) The final hearing of the administrative/executive group was held on 27-30 April 2018. Five individuals were acquitted and the others received sentences ranging between three and nine years.

13) The Defendants are:
(1) Ahmet Turan Alkan
(2) Ali Bulaç
(3) İbrahim Karayeğen
(4) İhsan Dağı
(5) Lalezar Sarıibrahimoğlu (Kemal)
(6) Mehmet Özdemir
(7) Mustafa Ünal
(8) Mümtazer Türköne
(9) Nuriye Ural
(10) Orhan Kemal Cengiz (lawyer)
(11) Şahin Alpay

The Charges

14) The Defendants are charged, variously, with violating some or all of the following provisions of the Turkish Criminal Code ("TCC"):
- Membership of a terrorist organisation (TCC 314/2)
- Attempting to overthrow the constitutional order (TCC 309/1)
- Aiding a terrorist organisation without being a member (TCC 220/7)

15) In a Supplementary Opinion produced by the Prosecutor on 18 April 2018, the charges against four Defendants were reduced to lesser charges of leading in a terrorist organisation[7] and/or terrorism propaganda charges[8].

16) The list of final charges against each Defendant, as provided by the Final and Supplementary Prosecutor's Opinion, is set out in Appendix 1.

Legal Basis for the Charges

17) The Prosecutor relies on the following provisions of the Turkish Criminal Code:

> **Article 220 (7): Establishing Organisations for the Purpose of Committing Crimes**
> Any person who aids and abets an [illegal] organisation[9] knowingly and willingly, although he does not belong to the structure of that organisation, shall also be sentenced for the offence of being a member of that organisation. The sentence to be imposed for being a member of that organization may be decreased by one-third according to the assistance provided.
>
> **Article 309 (1): Offences against the Constitutional Order and its Functioning**
> 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.
>
> **Article 314: Armed Organisation**
>
> (1) Any person who establishes or commands an armed organisation with the purpose of committing the offences listed in parts four and five of this chapter, shall be sentenced to a penalty of imprisonment for a term of ten to fifteen years.
>
> (2) Any person who becomes a member of the organisation defined in paragraph one shall be sentenced to a penalty of imprisonment for a term of five to ten years.

[7] Turkish Criminal Code, Art. 314(1); Anti-terror Law NR 3713; 5/1.
[8] Anti-terror Law NR 3713; 7/2.
[9] See Appendix 2 for the whole of this provision.

18) The Prosecutor also relies on Law 3713:

> **Article 5/1**
>
> Penalties of imprisonment and judicial fines to be imposed on perpetrators of offences specified under Articles 3 and 4 (terrorist offenses – including 314, 309) shall be aggravated by one half. Penalties to be determined accordingly may thereby exceed the regular upper limit of the penalty prescribed for that offence for any type of punishment. However, in case of life imprisonment, the sentence shall be transformed to aggravated life imprisonment.
>
> **Article 7/2**
>
> Any person who disseminates propaganda in favour of a terrorist organisation by justifying, praising or encouraging the use of methods constituting coercion, violence or threats shall be liable to a term of imprisonment of one to five years

The Composition of the Court and Hearings

19) The court is composed of three judges. However, this has changed over the course of the trial.

20) The first hearing took place on 18 September 2017. On that date, the President of the panel was Judge Mehmet Ali Özcan, supported by two additional judges, Fahrettin Düzalan and Kadir Karakoç.

21) The second hearing was on 8 December 2017. Whilst the two additional judges remained the same, the President of the panel on that date was Judge Murat Güler.

22) At the third hearing, on 5 April 2018 (in which the Prosecutor's Final Opinion was presented), the President of the panel was Judge Fahrettin Düzalan, supported by Kadir Karakoç and Abdullah Ok.

23) At both hearings of closing statements observed by BHRC (May and June 2018), the President of the panel was Judge Fahrettin Düzalan, and he was supported by two members, Kadir Karakoç and Abdullah Ok.

24) The judges sat on a raised platform at the front of the court. To their right, and on the same level, sat the Prosecutor, Mr Cem Üstündag. Judges and Prosecutor appeared to meet and congregate in the same room outside of Court.

25) The Defendants sat in front; those in pre-trial detention had gendarmes sitting next

to them, and they were handcuffed every time they left Court during the breaks.

26) During the May hearing, a large courtroom meant that there was ample space for observers and family members in the public gallery at the rear of the court, although at times, it was difficult to hear everything that was said. During the June hearing, a small courtroom was provided which meant not all family members were able to enter the court, and some sat on the floor, or two to a seat, as did the BHRC observer for part of the June hearing.

The Prosecution Evidence

27) 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.[10]

28) However, the original indictment does not set out the evidence clearly against each Defendant. Instead, it approaches the case thematically, focusing on the way FETÖ/PDY and those sections of the media considered FETÖ/PDY affiliated media is structured and functions. The Defendant's names are scattered throughout the indictment in a random manner, seemingly connected to the general statements about FETÖ/PDY media. It has therefore been necessary for the Defendants to trawl through the lengthy 64-page indictment and work out what the specific evidence against them is said to be and in connection with which charge. BHRC has not seen summaries of the entire prosecution case against all Defendants in translation. The difficulty in understanding the case arises because the allegations and evidence are scattered throughout. In some instances, the indictment lists the headline title of the article, but not the specific words or sentences which are said to be the basis of the allegation, or even what the criminal element in the article is alleged to be[11].

29) One Defendant, Orhan Kemal Cengiz, is not specifically mentioned in the indictment at all. His name appears in the section listing the Defendants and charges but no evidence is set out in connection with him. The only evidence raised against him is set out in the Prosecutor's Final Opinion on 5 April 2018.

30) This illustrates a further significant problem in the presentation and attachment of evidence to specific charges. There are voluminous appendices, running to multiple boxes of lever arch files, which contain seemingly random selections of "evidence" upon which the Prosecutor relies. The majority of this is not referred to on the face of the indictment itself. Many of the Defendants did not know either

[10] Code on Criminal Procedure, Law NR 5271, Article 170, see in particular Art.170(h) which states that the indictment should set out the charges and Art170(j) which requires the indictment to set out the evidence.
[11] In respect of Şahin Alpay, the indictment even says there are no criminal elements in his articles but that they display an overall stance which is in line with the editorial policy of *Zaman*.

some or all of this material had been presented and were surprised when the Prosecutor, in his Final Opinion on 5 April 2018, referred to considerable additional evidence that had not been referred to in the indictment, having been sent to the Defendants or their lawyers by CD on the night of the 4th April 2018. This was the first time that what was alleged to be specific evidence was linked directly to the charges, on a Defendant by Defendant basis. Even then, not all of the material in the appendices are relied upon in the Final Opinion.

31) Following discussions with the Prosecutor, several of the Defendants and the defence lawyers, it is not clear to BHRC whether some, all or any of that additional material was available to the Defendants when the indictment was made, nor whether or when it was presented to each of the Defendants. What is clear is that evidence on which the Prosecutor relied in his Final Opinion was not set out (clearly or at all) on the face of the indictment, nor was referred to by the Defendants or the Prosecutor in respect of their primary opening statements or in their own evidence to the Court or any subsequent questions by the judges and Prosecutor. Many of the Defendants submitted in their closings that they had no idea that the further material to which the Prosecutor relies in his final 5th April Opinion formed any part of the charges against them, and many of them stated that they only saw the material for the first time on the night of 4th April 2018, or for those in detention, at a later date in April and May when arrangements were made for them to see the material relied upon. That meant that Defendants were having to make their case on this material *for the first time* in their closing statements, after close of the Prosecutor's case.

32) An example of this lies in the case against **Lalezar Sarıibrahimoğlu (Kemal)**, who was a columnist at *Zaman* between 2014-6**.** She is charged with aiding a terrorist organisation without being a member (TCC 220/7). There is only one sentence in the indictment which refers to her alleged involvement. This appears in the section of the indictment which indicates a series of news stories on MIT (intelligence services) trucks taking weapons to Syria[12]. In the Final Opinion, the Prosecutor then relies on four articles (or sections of articles) allegedly relating to:

(a) the arrest of Hidayat Karaca and Ekrem Dumanlı, which Kemal describes as a coup attempt on press freedom;

[12] The Indictment seeks to explain the following: It claims FETÖ/PDY started a conspiracy against MIT (National Intelligence Services) and used the FETÖ/PDY media effectively in this process. There were two "conspiracies" in the media regarding the MIT trucks. It asserts: "The 2nd attempt could not be a coincidence as there was mention of it in the FETÖ media beforehand… In this way *Zaman* was turning MIT into a target right before the operation against the MIT trucks." It then refers to a column written by Lale Kemal published in *Zaman* newspaper on 18 January 2014 in which she writes: "*I find it dangerous that the citizens still live in fear of being profiled because of their views or beliefs… this is only done in less developed former communist countries ruled by dictators…".* The Prosecutor asserts that Lale Kemal was trying to deepen that impression by this single line. It is unclear from the indictment whether that particular column related to the MIT trucks story at all, since no attempt is made to provide any causative link between the charge and that single line that is asserted to be evidence.

(b) the operation against Bugün TV, which Kemal is reported to have described, saying "coup attempt or internal war will be a disaster for Turkey, so we have to continue to trust in the ballot."
(c) the operations against alleged pro-Gülen police officers;
(d) the MIT trucks story.

33) As stated above, **Orhan Kemal Cengiz**, is not mentioned in the indictment save generally by name and charge. No specific evidence was recorded against him at that stage. He is a lawyer who represented *Zaman* before the Turkish Constitutional Court, and also wrote as a columnist at a different newspaper, *Bugün Gazetesi*. However, in the Prosecutor's Final Opinion, he was accused of membership of a terrorist organisation. This was then reduced to a charge of making terrorist propaganda[13] in the Supplementary Opinion produced shortly afterwards. The Prosecutor cited the following allegations to support the charges:
(a) Comments made by Cengiz in a speech made to the Journalists and Authors Foundation in January 2014, where the Prosecutor alleges Cengiz said: "Friends, ok, the AKP has been carrying out a lot of anti-democratic practices but everybody sees what is happening, we know that the [Gülen] community is also trying to overthrow the Government, do not at least try to fool us. That's shameful";
(b) Comments written by Cengiz on the website diken.com.tr on 29 November 2015 that the Government was making efforts to create "palace guards" while he was writing on the Government's investigations into the Gülenist structure and, within this framework, the operation against the Koza İpek Group that aided the Gülenist organization
(c) Tweets which he posted on his own Twitter TimeLine:
(i) "Does Erdoğan want to destroy the [Gülen] community because he sees it as parallel [state] or because he cannot tolerate objections from within the religious community regarding what he wants to do?,"
(ii) On 23 August 2018, he tweeted, "If the allegation that the detained police officers were not allowed to have iftar [fast-breaking dinner] is true, the [European Court of Human Rights] would condemn the Erdoğan government for violating freedom of religion of Muslims";
(iii) On 26 July 2014, he tweeted: "Holding people without a court order after their detention period expires amounts to treating them like prisoners of war";
(iv) On 10 April 2015, he tweeted, "Everything that was done to the Jews in Europe, except the gas chambers, is today being done to members of the Gülen Community",
(d) He attended a panel organized by an organization called "Özgürlük ve Demokrasi Platformu" (the Platform for Freedom and Democracy) on 7

[13] Pursuant to Article 7/2 of Law NR 3717.

May 2015 and presented a placard to former police superintendent Anadolu ATAYÜN, a member of the Gülenist network;

(e) He was arrested on 21 July 2016, at the Atatürk Airport as he was about to depart for the UK;

(f) He was a columnist at the Bugün newspaper and the said newspaper was a media outlet that had the characteristic of being an extension of the Gülenist terrorist organization.

34) What follows is a summary of the Prosecutor's case against each of the remaining nine Defendants, as expressed in the Final Opinion.

35) **Ahmet Turan Alkan** is a journalist (currently in detention) who wrote a number of articles for *Zaman* concerning the corruption scandal and the 17/25 December investigation, as well as on İpek Koza Media Outlet operations and the arrests of Hidayet Karaca (Head of Samanyolu media group) and Ekrem Dumanlı (editor-in-chief of *Zaman*). The articles are said to represent an attempt to overthrow the constitutional order and show membership of an armed terror organisation, since the Prosecutor alleges that they demonstrate his attempt to persuade the public that conditions for a coup attempt had been met. The allegations against him are:

(a) Knowing that the 17/25 corruption operations aimed to overthrow the Government, but he tried to pass them off (in articles written at that time) as though they were a lawful operation;

(b) Showing loyalty to Fethullah Gülen by failing to criticise him and always acting on a pro-Gülen line.

36) **Ali Bulaç** was a columnist for *Zaman* (released from pre-trial detention on 11 May 2018). He was also a member of the Board of Trustees of the Journalists and Writers Foundation (Gazeteciler ve Yazarlar Vakfı). He is alleged to have signed a decision of the Foundation, alongside other executive members of Gülen's organisation or community, to elect Gülen as honorary president. The Prosecutor alleges that he was in constant communication with other high-level executives of that same organisation or community and went abroad with them several times. The Prosecutor also relies on:

(a) Bulaç held a bank account in BankAsya, which is alleged to have been the financial resource of FETÖ/PDY, and he is alleged to have transferred money to this account following an alleged call by Gülen himself. (No evidence of the call or of telephone records has been produced by the Prosecutor.)

(b) Several books and videos of or relating to Gülen were found on Bulaç's laptop and IPad;

(c) Various speeches and articles published in his column across a range of dates. The Prosecutor alleges some of them praise Gülen, some concern

the 17/25 corruption operations and investigations carried out against Gülen's community;

(d) One specific article has been singled out for proving the use of force against the Government in which Bulaç adopts language relating to the possible use of the sword by the oppressed (following the publication of an article on ODA TV on 6 February 2016 about an alleged coup attempt, and following a speech of Fethullah Gülen issued on herkul.org concerning the use of a sword in case of war (Note that Bulaç defends himself by explaining his rhetorical use of what is a verse in the Koran);

(e) Another article is singled out in which he is alleged to have described the investigations against the Fethullah structure as similar to the practice of the Nazi party;

(f) Allegations that Bulaç sought to justify the coup attempt through his Twitter account before 15 July 2016;

(g) Further articles which refer to the corruption scandal in which the Prosecutor alleges that Bulaç was seeking to prepare the public for a potential coup attempt. Such articles are alleged to have sought to persuade the public that the Government was weak, that it had been taken hostage and that the conditions for a coup attempt had been met. The Prosecutor asserts that these constituted attempts to overthrow the constitutional order.

37) **İbrahim Karayeğen** was the Night Editor for *Zaman*. He was initially accused of membership of a terrorist organisation. He is now accused of leading in a terror organisation. The allegations against him are:

(a) He had Bylock[14] on his phone;

(b) When he was arrested at Atatürk Airport on 18 July 2016, he was in possession of $1[15];

(c) His mobile phone contains photos of Fethullah Gülen;

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[14] Bylock was a publicly available smartphone app that allowed users to communicate between each other privately and using encryption. It was available to download via the Google Play store onto handsets running the Android operating system and via the Apple iTunes Store onto handsets running the Apple iOS operating system. It was taken down in mid-March 2016. Since the coup, the Turkish state has considered that the presence of Bylock on a smartphone or tablet as evidence of membership of a terrorist organisation. The reliance on this is problematic, however. See the legal opinion of William Clegg QC and Simon Baker of 2 Bedford Row which concludes that there is no evidence at all from which any reasonable person could conclude that the App was exclusively used by members of FETO/PDY and a great deal of evidence, much unchallenged, which demonstrates that the App was widely available and used in many different countries. William Clegg QC and Simon Baker, 'Opinion on the Legality of the Actions of the Turkish State in the aftermath of the failed coup attempt in 2016 and the Reliance on the use of Bylock App as evidence of membership of a terrorist organisation' (September 2017), available at <https://www.2bedfordrow.co.uk/opinion-on-the-legality-of-the-actions-of-the-turkish-state/> (last accessed 22 June 2018). Also see http://www.cumhuriyet.com.tr/haber/english/857304/Conspiracy-busting_expert_s_finding_will_change_the_course_of_ByLock_cases.html

[15] The Turkish state claims that possession of a $1 bill is proof of membership of FETÖ, and exists as a sort of membership card. See also Suzy Hansen, 'Inside Turkey's Purge' *the New York Times* (13 April 2017, available at <https://www.nytimes.com/2017/04/13/magazine/inside-turkeys-purge.html.

(d) Two social media shares (Twitter) concerning operations carried out against Gülen's community (*cemaat*)

38) **İhsan Dağı** was a columnist at *Zaman* between 2008-16. He is an author and an associate professor of international relations at Middle East Technical University. As with Cengiz, he was initially charged with membership of a terrorist organisation but the Supplementary Opinion reduced the charges to terrorist propaganda. The Prosecutor cites the following in evidence against him:

(a) Two articles which he is alleged to have written following the 17/25 December 2013 corruption scandal. The Prosecutor alleged that Dağı was aware that the corruption operations were aimed at overthrowing the Government, but he nevertheless portrayed them as being lawful operations;

(b) A single tweet, which Dağı translated as "It will be hard to come back from this black tunnel". This replicates the final tweet of Tahir Elçi, a Kurdish lawyer, before he was assassinated in November 2015.

39) **Mehmet Özdemir** (remains in detention) was the Managing Editor of *Zaman*. However, in the indictment and throughout the trial, the Prosecutor referred to him as the Editor-in-Chief of *Zaman*, appearing not to appreciate the distinction between the two jobs. The initial charges against him of membership of a terrorist organisation and attempting to overthrow the constitutional order were reduced (in the Supplementary Opinion, and without explanation) to leading a terrorist organisation. There appear to be no specific allegations against him at all. No evidence has been called which relates to leading (or being a member) of a terrorist organisation. The Prosecutor broadly relies on the articles written in *Zaman* about the 17/25 December 2013 corruption operations, alleging that he 'mediated' or channelled news sympathetic to Gülen. (Note, however, that Özdemir stated in his defence did not start working for *Zaman* until 1 July 2015.)

40) **Mustafa Ünal** (remains in detention) is a journalist and was *Zaman*'s representative in Ankara. The Prosecutor raises the following allegations against him:

(a) His tweets/shares on 15 July 2016, which the Prosecutor alleges referred to a witch hunt and a plot;

(b) Several articles allegedly concerning the corruption operations of 17/25 December, some criticism of Erdoğan (at that time) and the arrests of Ekrem Dumanlı and Hidayet Karaca. The Prosecutor alleges that he was aware of the fact at the time that the corruption operations were aimed at overthrowing the Government, but he tried to pass them off as lawful;

(c) Showing loyalty to Fethullah Gülen by failing to criticise him and always acting on a pro-Gülen line;

(d) Further articles which refer to the corruption scandal in which the Prosecutor alleges that he was seeking to prepare the public for a potential coup attempt by purporting to show the Government as a criminal body. Such articles are alleged to have sought to persuade the public that the Government was weak, that it had been taken hostage and that the conditions for a coup attempt had been met. The Prosecutor asserted that this constituted attempts to overthrow the constitutional order.

41) **Mümtazer Türköne** (remains in detention) was a columnist at *Zaman*. The Prosecutor relies on the following allegations:

(a) A direct message sent to him on Twitter by another member of the organisation;

(b) That he sent messages on Twitter several times to the following accounts which have been blocked by the authorities: Samanyolu Haber, *Zaman*, Bugün, Cihan, Yeniyön, Özgür Düşünce, Aksiyon and Nokta Dergisi.

(c) Several of his articles written in *Zaman* concerning the investigations against BankAsya and the police department which he considered to be a witch hunt to silence opponents;

(d) One specific article of 4 February 2016 has been singled out in which Türköne calls for the return of the death penalty**.** The Prosecutor alleges that in connection with the speech of Fethullah Gülen issued on herkul.org concerning the use of a sword in case of war and Bulaç's article adopting language relating to the possible use of the sword by the oppressed, these amounted to a combined effort to justify the coup attempt before 15 July;

(e) Several articles concerning the operations against the *Pro*-Gülen structure, especially operations against BankAsya, Kimse Yok Mu Derneği, Koza İpek Media Outlet Group and his allegations concerning the accountability of the Government and the Prime Minister Erdoğan (at that time) for these operations;

(f) That he was aware of the fact at the time that the corruption operations were aimed at overthrowing the Government, but he tried to pass them off as lawful;

(g) Showing loyalty to Fethullah Gülen by failing to criticise him and always acting on a pro-Gülen line;

(h) Articles which refer to the 17/25 December corruption investigation in which the Prosecutor alleges that he was seeking to prepare the public for a potential coup attempt by showing the government as a criminal body. Such articles are alleged to have sought to persuade the public that the Government was weak, that it had been taken hostage and that the conditions for a coup attempt had been met. For two years he had discussed in his columns notions such as corruption as well as the legal jeopardy which the Government and President faced. The Prosecutor

asserts that this constituted attempts to overthrow the constitutional order.

42) **Nuriye Ural** was an interviewer and a columnist with *Zaman* between 2001-2016. The Prosecutor makes the following allegations against her in support of the charges that she aided an armed terrorist organisation without being a member:

(a) That she interviewed Fethullah Gülen in 2004, following which she published a book called 'Fethullah Gülen' abroad;

(b) She interviewed a former police officer who conducted the 17/25 corruption operations;

(c) She wrote an article in which she criticised the operations against Gülen's community, as well as the arrests of Ekrem Dumanlı and Hidayet Karaca;

(d) In an article written by her following the 17/25 December corruption operations, she was aware of the fact at the time that the corruption operations were aimed at overthrowing the Government, but she tried to pass them off as lawful.

43) **Şahin Alpay** has written a column at *Zaman* since 2002, and is an academic. He is 73 years old. The following allegations are relied on by the Prosecutor in support of the charges that he was a member of a terrorist organisation, and that he attempted to overthrow the constitutional order:

(a) His computer contained some documents in word format, alleged to relate to 'questions to Gülen', pro-Gülen schools and universities, confiscation of *Zaman* newspaper, compliments to Fethullah Gülen, and denial of the existent of a secret structure;

(b) Participation in a TV programme which was broadcast before 15 July 2016 with Mehmet Altan[16] and Eser Karakaş, in which he is alleged to have spoken in favour of Gülen;

(c) Two tweets on his Twitter account concerning operations carried out against the pro-Gülenist structure;

(d) Articles concerning 17/25 December investigations which he described as 'corruption operations', criticizing İpek Koza holding operations, the operations against Ekrem Dumanlı and Hidayet Karaca and also the police members who carried out the Ergenekon and Balyoz operations, the

[16] Mehmet and his brother Ahmet Altan are journalists who were both jailed in 2018: Kareem Shaheen , 'Turkey sentences journalists to life in jail over coup attempt' *the Guardian* (16 February 2018), available at <https://www.theguardian.com/world/2018/feb/16/turkey-sentences-six-journalists-life-imprisonment-failed-coup> (last accessed 22 June 2018). BHRC observed part of their trial, which contained many similar features to the *Zaman* trial: 'Trial observation report - *Altan and Others v Turkey: journalists on trial after coup'* (June 2017) available at <http://www.barhumanrights.org.uk/wp-content/uploads/2017/09/Turkey-Report-June-2017.pdf> (last accessed 22 June 2018). Addendum report here: 'Turkey Trial Observation: Altan and Others', available at http://www.barhumanrights.org.uk/wp-content/uploads/2017/11/Turkey.Altan-trial.part-2.v1-.pdf (last accessed 22 June 2018).

media outlets and the schools of the pro-Fethullah structure, which Alpay described as a witch hunt;

(e) Showing loyalty to Fethullah Gülen by failing to criticise him and always acting on a pro-Gülenist line;

(f) Articles which refer to the 17/25 December corruption investigation in which it is alleged that he was seeking to prepare the public for a potential coup attempt by showing the Government as a criminal body, that he sought to persuade the public that the Government was weak, that it had been taken hostage and that the conditions for a coup attempt had been met. The Prosecutor asserted that these constituted attempts to overthrow the constitutional order

The Defence evidence and closing statements

44) BHRC has had the opportunity to watch and listen to nine closing statements[17] by the Defendants and their lawyers to date. Some of those statements were provided in English or in summary form, and are appended to this Report. Although Şahin Alpay has not yet made his statement, BHRC has had the opportunity to read the defence statement in English, and has spoken to İhsan Dağı to understand the nature of the defence closing statement which he and his lawyers will make on 5-6 July.

45) All of the Defendants have focused, to a greater or lesser degree on the following common features:

(a) That journalism is not a crime;

(b) That the articles and/or the social media tweets relied upon by the Prosecutor represent the freedom of journalists to legitimately express their opinion;

(c) That the articles which have been relied on are selectively cherry picked, taking sentences or headlines out of context of the whole piece and/or out of context of the time and political period in which the column was written and/or constitute a fundamental misunderstanding of political or religious phrases sometimes used by journalists rhetorically;

(d) That in some cases, the whole of the column piece actually defeats the charge in its entirety;

(e) That the Prosecutor relies only on the fact that the Defendants worked for *Zaman* (although Cengiz is in a different category), but that such weak association is insufficient to substantiate the actual charges brought;

(f) That no evidence whatsoever has been produced to show that the Defendants were ordered or instructed to write pieces by anyone else

[17] Detailed notes were taken by the BHRC trial observer of the closing statements during the trial. Since the notes were made simultaneously through translation by a professional interpreter, they do not purport to be verbatim and are not attached to this Report.

and/or with the knowledge or intent that they were seeking to overthrow the constitutional order;

(g) That no or no sufficient causative link has been established between the evidence relied upon by the Prosecutor and the charges themselves;

(h) That no evidence has been procured or relied upon by the Prosecutor to support the actual charges, for example no evidence whatsoever has been produced to support the Article 309 charges on attempting to overthrow the constitutional order through force and violence;

(i) The articles or social media shares relied upon cannot themselves constitute force or violence;

(j) That the charges brought are not charges of incitement, but in any event the articles or sentences relied upon by the Prosecutor do not support, instigate or call for the use of violence;

(k) That no evidence has been procured or relied upon by the Prosecutor which shows, or even could show, that the Defendants are members of FETÖ or have physically, financially or otherwise supported the organisation;

(l) That the evidence relied upon by the Prosecutor is general and generic in nature as to the structures of FETÖ/PDY and the allegation that the *Zaman* editorial line supported the Gülen movement;

(m) That at the time the articles were written, FETÖ/PDY was not declared a terrorist organisation by either the Government or the courts (and/or that in the absence of a decision by an appellate court (which there has not yet been), the organisation is not a proscribed terror organisation in any event). Indeed, at the time when many of the articles were written, both Gülen and *Zaman* enjoyed a good relationship with the ruling party;

(n) That there are significant factual errors in the indictment which the Prosecutor has not bothered to check (e.g. Nuriye Ural did not write the book of which she stands accused, but was merely a contributor to a compilation, created by *Zaman* newspaper; Mehmet Özdemir was not the Editor in Chief of *Zaman*, but performed a wholly different function of Managing Editor, without input or responsibility into the editorial line);

(o) That insofar as the Prosecutor relies on asserting that the articles contained veiled references, he has not spelled out what they were meant to mean, and to whom, why public criticism, should be construed as creating conditions or calling for a coup in the absence of specificity and/or why they would have appeared publicly on an open platform such as Twitter;

(p) That it is entirely in the course of legitimate work for journalists to have books, articles and other information relating to a variety of topics, including controversial ones, in their homes and on their computers;

(q) That being at the airport and attempting to validly leave the country for a planned trip is not evidence or sufficient inference of terrorism or connection with terrorism;

(r) That having Bylock on one's phone is not evidence of terrorism or sufficient inference of terrorism, in particular without evidence of how, when or in what capacity it is said to have been used;

(s) That having a bank account with BankAsya, a legitimate and official bank, is not evidence or sufficient inference of terrorism or connection with terrorism. It is asserted that *Zaman* required salaries to be paid into BankAsya;

(t) That the decisions of the Turkish Constitutional Court and the European Court of Human Rights should have been enough to stop these prosecutions, which on the flimsy evidence relied upon by the Prosecutor, should never have been brought at all[18].

46) In particular, the Defendants dispute the interpretation and/or weight which the Prosecutor has sought to place on some of the words or phrases which he alleges support the charges. In one instance, the Prosecutor states that Türköne's use of the word 'autocracy" in describing the Government was evidence of his support for the coup attempt. Summarising one aspect of his defence, Türköne said that googling the word 'autocracy' would result in millions of hits, since it was not a word he invented, and instead was a word used by . Socrates, Aristotle and others. Yet, he complained, based on this word, he was accused of attempting a coup. This illustrates the way the Defendants claim that the Prosecutor has failed to provide any proof whatsoever of their involvement in terrorism, instead relying on cherry picked words which do not have even the character attributed to it by the prosecution. Other examples include the Prosecutor's reliance on the tweeting or citing of a phrase which comes from the Koran against both Mustafa Ünal and Ali Bulaç, apparently in ignorance of its provenance. In short, in many instances, the Defendants assert that the Prosecutor has misunderstood rhetorical, religious or literary phraseology and his reliance on it to bring terrorism charges demonstrates that there is no basis to the charges whatsoever

47) Another feature of many of the defence statements was their reliance on the fact that the Defendants simply did not know, and could not have been expected to know, that FETÖ/PDY was a terrorist organisation at the time when they wrote the material articles. They pointed to the fact that *Zaman* was in favour with Government ministers at the time, who also associated with Gülen. Encapsulating these strands of the defence, Ali Bulaç stated: *"You tell the public that they were deceived by the movement. But I was also deceived. So what makes a difference between you and me?*" No or no proper attempt by the Prosecutor appears to have

[18] See further below.

been made to prove knowledge by any of the Defendants of any underlying aim of the movement or organisation at the time that their articles were written. Herein lies a key aspect of the defence – if the Turkish State itself did not know, how did these journalists know in the absence of proof beyond reasonable doubt that FETÖ/PDY was a terrorist organisation? Again, this is encapsulated in Ali Bulaç's defence:

> *"Did I give the orders to stage a coup? Did I take part in pre-coup meetings? Did I bomb those innocent people who were killed on that night by jet fighters? Did I launder money on behalf of the group? Did I illegally transfer money abroad? Did I have connections with the police and military officers who actively took part in the process? No, none. So how can I be labelled as the member of the organization?"*[19]

48) The Defendants and their lawyers were scathing as to the decision of the Prosecutor to continue with prosecutions on very serious terrorism charges which could not be supported by any evidence whatsoever, and in respect of which no or no proper attempt had been made by the Prosecutor to build a case and that, as some Defendants stated, the prosecution amounted to a politically motivated decision.

49) Most or all of the Defendants also point to what they claim are very significant procedural failings. In particular, they complain that the indictment was not clear as to the specific acts alleged to have been committed. They were also served with a mountain of new evidence shortly before their closing statements, which was not put to them by the Prosecutor, and in respect of which they were not asked any questions. Many of the Defendants complained that they had been burdened with explaining that considerable new evidence, attached in Word format (and hence the contents were capable of amendment) on a compact disc on the 4th April 2018 (or later for those Defendants in detention). Many of the Defendants complained that the original versions of the column pieces had not been presented by the Prosecutor, and in many instances without the full piece so that simply a line or a few lines were presented. This left the defence having to attempt to identify what the article from which the words were taken was about, and when it was written. All of the Defendants are prolific writers and have extensive archives of material. This task was made considerably more difficult by the fact that the *Zaman* digital archives had been removed by the national authorities. No explanation was provided as to why the Prosecutor had not produced the original articles.

[19] See also https://www.indexoncensorship.org/2017/09/zaman-journalists-appear-court/

50) These complaints are summed up by Türköne in his closing statement where he stated to the Court:[20]:

> *The Prosecutor seems to be relying on 600 additional columns on the CD given to us [on night of 4 April 2018] which were not on the charge sheet/indictment where only 35-40 columns were relied upon. The CD given to us is different from that given to my lawyer, and columns have been added after the Final Opinion was given by Prosecutor. In short, the Final Opinion has been prepared with evidence not presented to the court. These are presented as columns simply put on a word document on the CD. Some Word files contain sentences which have been changed, or could be changed because the text can be amended. Additionally, the Opinion was prepared without waiting for our request for evidence made to [BankAsya] to be answered . A key focus for us is the 1000 columns on a CD – how were these prepared, where were these prepared, by whom and how were they put onto the Word document. How can you know they are original and untainted? We were given the CD on the night of the 4th April and the Prosecutor provided his Final Opinion on the 5th April. We can't defend ourselves against documents that have been presented late, could have been altered and we know nothing about how they come to appear in that format.*

51) Ali Bulaç specifically stated that, in respect of the Oda TV issue, he was not permitted to call a witness.

52) In addition, Orhan Cengiz - whose only connection with *Zaman* is that he represented it as its lawyer before the Constitutional Court – explained that he was one of the co-founders of London-based Tahir Elçi Human Rights Foundation and was going to England on that particular date to attend the meeting of the Board of Directors of the Foundation. In addition to seeking to show that the articles and comments attributed to him do not come close to demonstrating the charges, he also added[21]:

> *I strongly believe that this "opinion" of the Prosecutor is just a retaliation against my role as a human rights lawyer. My conclusion is that I was included in this case because I represented Zaman newspaper (the case related to appointment of trustees and seizure of the newspaper). I also strongly believe that this final deliberation that seeks an aggravated life sentence against me is just a retaliation for my role in the Altan brothers case both before the Constitutional Court and the European Court of Human Rights.*

[20] This was translated simultaneously. It may not be an exact verbatim record of what was stated.
[21] This was translated simultaneously. It may not be an exact verbatim record of what was stated.

Relevant decisions of the Turkish Constitutional Court and the European Court of Human Rights

53) Unusually, Şahin Alpay's case (alongside the parallel case of Mehmet Altan[22]) has been tested and scrutinised by both the Turkish Constitutional Court (judgment of 11 January 2018[23]), and the European Court of Human Rights in Strasbourg (judgment of 20 March 2018)[24] in the context of pre-trial detention. This required the court to look at the nature of the evidence against him.

54) The TCC[25] held that his detention was unlawful since it was not based upon any reasonable suspicion or supported by firm evidence[26]. It is worth citing the summary by the ECtHR in full on the TCC's findings[27]:

> *After Examining the substance of these articles, the Constitutional Court found that they mainly dealt with matters relating to the "17-25 December [2013]" criminal investigations. In them the applicant had set out his opinion that the government members implicated in the criminal investigation in question should be brought to justice and that it was the responsibility of the President and the ruling party's leaders to take action to that end. He had contended that the government's reaction to the investigation had been unjust. The Constitutional Court also observed that the applicant had written that if the investigation in question had been carried out on the orders of suspected members of FETÖ/PDY, they too should be the subject of a criminal investigation. However, he had maintained that it was unfair to accuse all members of the Gülenist movement. The Constitutional Court further noted that in the articles in question, the applicant had not argued that the government should be overthrown by force. On the contrary, he had asserted that the ruling party would lose in the next elections. The Constitutional Court also found that the article published one day before the attempted military coup suggested that the applicant was opposed to coups d'état. It held that he had been expressing opinions on a topical issue that were similar to those of the opposition leaders. In the Constitutional Court's view, the investigating authorities had been unable to demonstrate any factual basis that might indicate that the applicant had been acting in accordance with the aims of FETÖ/PDY. It added that the fact that he had expressed his views in Zaman could not in itself be deemed sufficient to infer that the applicant was aware*

[22] *Mehmet Hasan Altan v Turkey*, (no. 16538/17), judgment of 20 March 2018.
[23] Republic of Turkey Constitutional Court, *Şahin Alpay* [PA], no. 2016/16092, (11 January 2018) in which the court held, by eleven votes to six, that there had been a violation of the right to liberty and security and the right to freedom of expression and of the press.
[24] As well as in the parallel case of Mehmet Hasan Altan, part of which domestic trial BHRC also observed.
[25] Proceedings commenced by the applicant on 8 September 2016.
[26] See, in particular para.32 ECtHR judgement in *Şahin Alpay v Turkey* (App.No. 16538/17):, which summarises the TCC position as: *"..if it were accepted that people could be placed in pre-trial detention without any strong evidence that they had committed an offence, the guarantees of the right to liberty and security would be meaningless. Accordingly, it held that the applicant's pre-trial detention was disproportionate to the strict exigencies of the situation and that his right to liberty and security, as safeguarded by Article 19 § 3 of the Constitution, had been breached."*
[27] Set out in the context of examining the lawfulness of pre-trial detention.

of that organisation's goals. Accordingly, it concluded that "strong evidence that an offence had been committed" had not been sufficiently established in the applicant's case.

55) The TCC found that Şahin Alpay's pre-trial detention could have a "chilling effect on freedom of expression and of the press, in so far as it had not been based on any concrete evidence other than his articles"[28].

56) Following the TCC judgment, on 11 January 2018, Alpay's lawyer applied to the Istanbul 14th Assize Court for release. This was rejected on the basis that it had not yet received official notification of the Constitutional Court's judgment. On 12 January, the Assize Court reconsidered the application of its own motion. It rejected it, on a majority basis, on the ground that the Constitutional Court did not have any jurisdiction to assess the evidence in the case file[29]. In fact, he was not released until April 2018 when he was moved to house arrest. On 11 May 2018, he was conditionally released pending the conclusion of the trial and verdict.

57) The ECtHR relied on the Constitutional Court's assessment of the evidence to conclude strongly that "where the views expressed do not constitute incitement to violence – in other words, unless they advocate recourse to violent actions or bloody revenge, justify the commission of terrorist acts in pursuit of their supporters' goals and can be interpreted as likely to encourage violence by instilling deep-seated and irrational hatred towards specified individuals – the Contracting States cannot restrict the right of the public to be informed of them, even with reference to the aims set out in Article 10 § 2, namely the protection of territorial integrity or national security or the prevention of disorder or crime"[30].

58) Further, the ECtHR stated that "criticism of governments and publication of information regarded by a country's leaders as endangering national interests should not attract criminal charges for particularly serious offences such as belonging to or assisting a terrorist organisation, attempting to overthrow the government or the constitutional order or disseminating terrorist propaganda. Moreover, even where such serious charges have been brought, pre-trial detention should only be used as an exceptional measure of last resort when all other measures have proved incapable of fully guaranteeing the proper conduct of proceedings."[31]

[28] At para 33 ECtHR judgment, ibid.
[29] See further paras. 37-42 *Şahin Alpay v Turkey*, ibid.
[30] See para.179-182 *Şahin Alpay v Turkey*, and see further para 180: "the existence of a "public emergency threatening the life of the nation" must not serve as a pretext for limiting freedom of political debate, which is at the very core of the concept of a democratic society."
[31] At para.181 *Şahin Alpay v Turkey, ibid*

59) The Court concluded that there had been a violation of Article 10. It also noted that "the Public Prosecutor, in bringing the charges against the applicant, and the judges, in deciding to keep him in pre-trial detention, interpreted those provisions as covering the articles written by him, the Court considers that serious doubts may arise as to whether he could have foreseen his initial and continued pre-trial detention on the basis of Articles 309, 311 and 312 in conjunction with Article 220 § 6 of the Turkish Criminal Code".

60) BHRC had the opportunity to ask the Prosecutor about the impact of these two decisions, and the decision to continue to prosecute Şahin Alpay and his colleagues in light of the Courts' conclusions. The Prosecutor stated that he wished to make no comment.

Compliance of the proceedings with international fair trial standards: Interim conclusions

Many fundamental rights are formally protected under Turkey's Constitution[32]. 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 European Court of Human Rights (the ECtHR).

A. The "State of Emergency"

Article 15(1) 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."

61) 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 15[33]. Turkey is one of only nine countries to have notified of a derogation since the ECHR came into effect[34]. Pursuant to Article 15, a Contracting Party 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".

[32] https://global.tbmm.gov.tr/docs/constitution_en.pdf

[33] On 21 July 2016, the Turkish authorities notified the Secretary General of the Council of Europe and the Secretary General of the United Nations about their derogation from the ECHR and the ICCPR during the state of emergency. The derogation instrument lodged with the Secretary General of the Council of Europe pursuant to Article 15 ECHR did not set out which Convention articles were affected by the emergency decree laws. See further Venice Commission Opinion on Emergency Decree Laws Nos 667-676, adopted after the failed coup attempts, adopted by the Venice Commission at its 108th Plenary Session December 2016: http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)037-e

[34] https://www.echr.coe.int/Documents/FS_Derogation_ENG.pdf

62) The case law indicates that the ECtHR allows Contracting Parties 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 necessary[35].

63) In particular, 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[36]. Turkey has continued to extend its notification[37].

Observations & Concerns:

64) 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 detained.[38] Since that time, the numbers of judges, prosecutors, military and police officers, other public officials and academics removed from office has 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.

65) In January 2018, UN Special Rapporteurs[39] urged the Turkish Government not to extend the exceptional legal measures it has taken under its declared state of emergency. They expressed concern about the "severe crackdowns on civil society, including journalists, the media, human rights defenders, jurists, academics, and

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[35] See Alpay v Turkey; Altan v Turkey supra. http://www.echr.coe.int/Documents/FS_Derogation_ENG.pdf
[36] See Alpay v Turkey; Altan v Turkey supra.
[37] https://rm.coe.int/09000016807bcc6c. See also its notification to the UN in respect of derogation from the ICCPR where it has explicitly included various Articles, including the right to a fair trial and freedom of expression. https://treaties.un.org/doc/Publication/CN/2016/CN.580.2016-Eng.pdf
[38] http://www.barhumanrights.org.uk/bhrc-condemns-mass-arrest-of-judges-and-prosecutors-in-turkey/
[39] *Mr. David Kaye, Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; Ms. Fionnuala D. Ní Aoláin, Special Rapporteur on the promotion and protection of human rights while countering terrorism; Ms. Urmila Bhoola, Special Rapporteur on contemporary forms of slavery, including its causes and consequences; Ms. Agnes Callamard, Special Rapporteur on extrajudicial, summary or arbitrary executions; Mr. Michel Forst, Special Rapporteur on the situation of human rights defenders; Mr. Diego García-Sayán, Special Rapporteur on the independence of judges and lawyers; Mr. José Antonio Guevara Bermúdez, Chair-Rapporteur of the Working Group on Arbitrary Detention; Mr. Léo Heller, Special Rapporteur on the human rights to safe drinking water and sanitation; Mr. Nils Melzer, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; Mr. Ahmed Shaheed, Special Rapporteur on freedom of religion or belief; and Mr. Alfred de Zayas, Independent Expert on the promotion of a democratic and equitable international order.*

civil servants, as well as the use of various powers in ways that are inconsistent with its obligations under the International Covenant on Civil and Political Rights and the European Convention on Human Rights." They emphasised that "emergency powers must…not be used as a means to limit legitimate dissent, protest, belief and opinion, expression and the work of civil society, which in turn risks violating, inter alia, fair trial and due process guarantees, the prohibition of torture and of arbitrary detention and even the right to life."[40]

66) BHRC reiterates its initial concerns in light of the huge numbers of those who have now been removed from their professional 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 two years later; that so many people 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.

67) In his closing statement, Ahmet Turan Alkan stated the following to the Court[41]:

> *"It is no longer law but political powers which guide law. Anyone, prosecutors, judges, soldiers are all afraid of the ruling party. A public sector now afraid of each other. Government is using these arrests as a stick to beat with. You [judges] know better than me…In custodial prison, up on the 7th floor, I came across a previous judge, someone who once worked as a judge. He told me that he had been a judge on the 7th floor [in court], but now he was on the minus 7th floor in custodial prison. It is abnormal that judges or prosecutors fear suspension or arrest, or feel tense before issuing a ruling. They should stand straight, dominant, even though the political arena changes. Nobody has the right to politicise the judiciary. This is your problem."*

This statement, captured in translation at the time it was made[42], neatly encapsulates the problem faced by the Defendants in this case, and similar cases. When the reasonable observer knows that judges face being removed, arrested or detained themselves on spurious grounds, the right to a fair hearing is severely undermined since the appearance of an independent and impartial judiciary has been compromised.

[40] https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22592&LangID=E

[41] This was translated simultaneously. It may not be an exact verbatim record of what was stated.
[42] This was translated simultaneously. It may not be an exact verbatim record of what was stated.

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…"

68) 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. The absence of sufficient safeguards securing the independence of judges within the judiciary may lead to a conclusion that a defendant's doubts as to the independence and impartiality of a court may be said to have been objectively justified[43].

69) 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[44]. First, judges must not allow

[43] Parlov-Tkalčić v. Croatia, App No24810/06, 22 December 2009 at § 86; Daktaras v. Lithuania, App No 42095/98, 11 January 2000, at § 36; Moiseyev v. Russia, App No 16903/03, 1 April 2010, at § 184.

[44] See further Kyprianou v. Cyprus, App Np 79737/01, 15 December 2005, at §118; Piersack v. Belgium, A/53, 1 October 1982, at § 30; Grieves v. the United Kingdom [GC], App No.57067/00, at § 69); Castillo Algar v. Spain, 28 October 1998, at § 45).

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[45]. 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'. What is at stake is said to be the confidence which courts in any democracy must inspire in the public, including in the accused[46].

The appointment of judges: observations and concerns

70) Consequent to the state of emergency the President issued a decree changing the composition of the committee that appoints judges[47] to shift the balance of appointment from the judiciary to the President himself – a change deprecated by the Council of Europe[48].

71) A key feature of the above question involves the removal of thousands of judges from office. Given the required impartiality and independence of the judiciary[49], 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 exercise of due process.

72) It was asserted and/or implied by more than one Defendant in the instant trial that judges face fear of being removed on the basis of their political allegiance, and that the judges in this trial may be next. Irrespective of the subjective accuracy of that claim in this case, the move from an independent judicial commission to a process of political appointment, combined with the very high number of judges and prosecutors that have been removed since the coup[50], facilitates patronage and the harmful appearance of politicisation of the judiciary. It severely undermines confidence in due process and the rule of law and increases the likelihood of a finding that there has been a violation of Article 6(1).

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[45] Şahiner v. Turkey, App NO.29279/95, 5 April 2011, at § 44

[46] Castillo Algar v. Spain, ibid.

[47] High Council for Judges and Prosecutors (HSYK)

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

[49] UN Basic Principles on the Independence of the Judiciary, Principle 1

[50] See, e.g. the recent report of PPJ on the Independence of the Judiciary in Turkey http://www.platformpj.org/wp-content/uploads/non-independence-1.pdf

The relationship between the Judges and the Prosecutor: observations and concerns

73) In observing the trial, some features gave rise to concern (which have been noted by previous BHRC observers). The Prosecutor sat at the same level as the judges and in similar robes, and they appeared to share the same meeting and discussion room outside of court. These aspects gave the impression of inappropriate proximity between the judges and the prosecution[51].

74) 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.

75) The BHRC observer was permitted an opportunity to briefly introduce herself to two of the judges and the Prosecutor, and to ask some general questions about the proceedings. This took place during a natural pause in the proceedings and in a room in which they were all already seated together drinking tea.

76) BHRC observed that neither the judges nor the Prosecutor asked the Defendants any questions on new matters of evidence arising in consequence of the Prosecutor's Final or Supplementary Opinion. BHRC had the opportunity to ask the Judges and Prosecutor what the usual procedure was in Turkey in respect of cross-examination. The President assured BHRC that questions had been asked of the Defendants in the earlier hearings. However, the Defendants and their lawyers, supported by other observers, stated that neither the Prosecutor nor the Judges had asked more than a few questions, which were minor in nature, did not ask about the evidence linked to the indictment and were not designed to probe or test the evidence in any way. In particular, none of the Defendants were taken to the specific words attributed to them and asked to explain what they meant by the Judges or Prosecutor. In the May and June hearings observed by BHRC, no questions were asked of the Defendants by the Prosecutor and he did not address the court. Almost no questions were asked by the Judges, except for in respect of very minor procedural points.

77) One particular feature of this trial (and other similar terrorism trials in Turkey) is that there has not been consistency of judges throughout the actual trial. Whilst it is reasonable that different judges determine preliminary or procedural matters in the course of criminal proceedings, in order to ensure a properly reasoned judgment is arrived at, the same panel should be available to hear the entirety of the evidence and closing submissions, without very good reason. In this case, there has been a changing panel of judges once the trial actually commenced. This raises

[51] See, e.g., Borgers v Belgium, Application no. 12005/86, 30 October 1991.

serious concerns about the consistency of the judicial process and raises a prima facie concern, or at least the striking appearance, that the substance of the trial may have been pre-judged and/or that the court has not followed the entirety of the evidence in reaching its conclusion.

78) The appearance of the proceedings was that the prosecution and judges were acting in concert with no separation of function. The cumulative facts raised above may lead to the likely conclusion that there has been a violation of Article 6(1) and Article 14(1) ICCPR.

C. Specificity of charges and sufficiency of evidence

Article 14(3)(a)
In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees in full equality;
(a) To be informed promptly and in detail in a language which he understands the nature and cause of the charge against him.

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…"

79) Article 6(3) must be considered in light of the more general right guaranteed by Article 6(1) to a fair hearing. The right to be informed of the nature and the cause of the accusation must be considered in the light of the accused's right to prepare his defence. The provision of full, detailed information concerning criminal charges against a Defendant, and consequently the legal characterisation that the court might adopt in the matter, is an essential prerequisite for ensuring that the proceedings are fair [52].

80) Particulars of the offence play a crucial role in the criminal process, in that it is from the moment of their service upon the suspect that the suspect is formally put on written notice of the factual and legal basis of the charges against him or her[53].

81) The duty to inform the accused rests entirely on the prosecution and cannot be complied with passively by making information available without bringing it to the attention of the defence[54].

[52] Pélissier & Sassi v France App. No. 25444/94) § 54; Sejdovic v. Italy [GC], App No 56581/00, at § 90).
[53] Kamasinski v. Austria, A/168, 19 December 1989, at § 79; Pélissier and Sassi v. France [GC], ibid, at § 51
[54] Mattoccia v. Italy, App No.23969/94, at § 65; Chichlian and Ekindjian v. France, App No. 10959/84, Commission report, at § 71.

82) The accused must be duly and fully informed of any changes in the accusation, including changes in its "cause", and must be provided with adequate time and facilities to react to them and organise his defence on the basis of any new information or allegation[55].

83) Article 6(1) and Article 6(3) are closely inter-related. Equality of arms is an inherent feature of a fair trial. It requires that each party be given a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage. The right to an adversarial hearing means in principle the opportunity for the parties to have knowledge of and comment on all evidence adduced or observations filed with a view to influencing the court's decision. The role of appearances in adhering to these concepts is important and may also lead to a violation of the provision[56].

The Indictment: Observations and Concerns

84) The indictment in this case is striking in its lack of clarity. Turkish criminal procedure requires the evidence to be relied upon to be set out against the charge levelled. In the majority of cases, the Defendants and their lawyers have had to work through the indictment to try to understand the factual basis of the charges against them and what it is they are alleged to have done. Whilst the emphasis and tenor of the indictment has been on establishing that *Zaman* allegedly acted as part of the media wing of FETÖ/PDY itself, it fails to set out, precisely or at all, what the criminal element is that each Defendant is alleged to have done. Given the seriousness of these charges, and the sentences they attract, this is a very serious failing.

85) Moreover, the indictment does not refer to the many additional articles cited in evidence by the Prosecutor in his Final Opinion. This is considered further below.

Lack of a Prima Facie Case: Observations and Concerns

86) The defence lawyers have argued that the evidence said to make out the charges does not constitute a *prima facie* case. The summary of those defences appears above. BHRC notes that there are clear evidential and procedural deficiencies in the indictment.

87) The Prosecutor has not focused on proving any causative link between the charges and the articles or views expressed by the Defendants who are political columnists.

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[55] Mattoccia v. Italy, ibid, § 61

[56] See Borgers v Belgium, supra, where the inequality of arms was exacerbated by the Avocat Général's participation, in an advisory capacity, in the court's deliberations.

The substance of the charges against them relies unduly on weak association evidence, the link between working for *Zaman* and allegedly writing in accordance with its editorial policy, itself vaguely defined and without the production of specific evidence to that effect, is sufficient to deem an inference that the Defendants have committed these crimes. BHRC considers that this amounts to a charge of guilt by association, which has no proper basis in law. Association alone is insufficient to prove collaboration.

88) In that vein, no proper or serious attempt has been made to causatively link the charges with the allegations. The allegations relate largely to opinion columns or statements expressed in the public arena, through television broadcasts and social media. Such opinion pieces are the product of political commentators and form part of extensive archives of criticism and comment. The comments relied upon by the Prosecutor appear to have been cherry-picked, without analysis, consideration or even provision of the whole article or comment piece. Isolated words or phrases are picked out seemingly without any context. Moreover, the majority of the articles were written or relate to events which took place in late 2013 and 2014, in the aftermath of the corruption scandal which broke in December 2013, in which (then) Prime Minister Erdoğan and his family were implicated. None of the articles relied upon by the Prosecutor appear to relate to the period after which FETÖ/PDY was proscribed as a terrorist organisation.

89) Most of the journalists charged have extensive historical archives of opinion writing. In many instances, the Prosecutor appears to have relied on a single line, or a headline or short paragraph which ignores (a) the context of the piece as a whole, (b) the context of the political and historical events which triggered the piece, (c) the wider views and the archive of the journalists which strongly supported reform through the ballot box as opposed to through a coup d'état. In some instances, the Prosecutor appears completely to have misunderstood the literary, religious or rhetorical device or flourish which is a tool of the journalist's trade.

90) There are serious procedural flaws which have emerged over the course of these two observations. In particular, the indictment is extremely vague and broad, such that Defendants have had to search through it to understand what the allegations against them are. In at least one instance, no allegations appear on the face of the indictment against the Defendant Orhan Cengiz, a lawyer who represented *Zaman* in the Constitutional Court and who has represented journalists before the European Court of Human Rights. That raises the real concern that he may have

been arrested and charged by virtue of association with his client, in violation of the UN Basic Principles on the Role of Lawyers[57].

91) On 4 April 2018, a year after the indictment was served and following the close of the Prosecutor's case and the defence opening statements and evidence, the Prosecutor served a Final Opinion in which he relied on dozens of additional articles about which no evidence had been heard previously. On the night before he presented that Opinion, a dump of additional evidence was sent to the Defendants' lawyers (although those in detention did not immediately received this further evidence). The Defendants therefore had to address considerable additional evidence in a short space of time, in a format which was unexplained and inadequate and upon which the indictment was silent.

92) BHRC observes that whilst there is a dispute as to whether the additional late evidence was in fact available to the Defendants in extensive boxes of lever arch files of appendices, attached behind the indictment of April 2017, the Prosecutor only chose to rely on them after judgment had been received in Şahin Alpay's case from the European Court of Human Rights in which violations were found of Articles 5, 6 and 10 ECHR, with a particular emphasis on the Turkish Constitutional Court's conclusions on the state of the evidence. Noting that no explanation was given to the Defendants, or indeed to BHRC when the Prosecutor was asked about this late production/reliance on new evidence in the Final Opinion, it is, at minimum, capable of giving the impression that there has been a belated attempt to bolster the evidence which the Prosecutor knows to be below the requisite standard or proof.

93) Both the Turkish Constitutional Court, and the European Court of Human Rights in reliance on the Constitutional Court's assessment, concluded in relation to the evidence relied upon by the Prosecutor that *the investigating authorities had been unable to demonstrate any factual basis that might indicate that the applicant had been acting in accordance with the aims of FETÖ/PDY. It added that the fact that he had expressed his views in* Zaman *could not in itself be deemed sufficient to infer that the applicant was aware of that organisation's goals. Accordingly, it concluded that*

[57] See Principles 18. Lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions.
See also Principle 23: Lawyers like other citizens are entitled to freedom of expression, belief, association and assembly. In particular, they shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights and to join or form local, national or international organizations and attend their meetings, without suffering professional restrictions by reason of their lawful action or their membership in a lawful organization. In exercising these rights, lawyers shall always conduct themselves in accordance with the law and the recognized standards and ethics of the legal profession.

"strong evidence that an offence had been committed" had not been sufficiently established in Şahin Alpay's case.

94) This has strong implications for all of the Defendants in the *Zaman* hearing. The nature and form of the association evidence relied upon by the Prosecutor is extremely weak. No or no sufficient causative connection appears to have been made between the charges themselves and the opinions expressed by journalists in the ordinary and everyday course of their work. There are, for example, no or no sufficient attempts made to demonstrate that the articles in themselves incited the use of force and violence, still less that the Defendants applied force and violence in the attempted overthrow of the Government. No evidence whatsoever has been relied upon to demonstrate that the Defendants knew of the plan to mount a coup attempt, or that they were part of such an attempt. Nor has any serious or proper evidence been led to demonstrate that they were members (or even in two cases leaders) of an armed terror organisation.

95) Instead, BHRC observes that in respect of some of the Defendants, the same generic hallmarks which have been relied upon by the Turkish authorities in their purge of professionals after the coup attempt, have been relied upon in support of the charges here. So, in a few instances, the allegations amount to the holding of a bank account in BankAsya (which was at the material time, and until six days after the coup, a legitimate financial and banking institution in Turkey[58]); or the presence of Bylock on a smartphone, an encrypted messenger app available worldwide on smartphones; or the possession of a $1 bill, which the Turkish authorities allege is the membership mark of FETÖ/PDY. In some instances, the Prosecutor has relied on friendships or attendance at Gülen-funded schools many years ago, at a time when they were an entirely legitimate part of Turkey's education system, or on the apprehension of a Defendant at the airport, on his way to a trip abroad[59].

96) BHRC recalls that pursuant to Art 6(3)(d), Defendants have a right to examine and challenge witnesses against them as part of an adversarial trial. In this case, the prosecution has not called a single witness in support of these terrorism charges and has prevented at least one Defendant from calling a witness of his choosing. In and of itself, this is a striking omission which underlines the concern BHRC raises above about the sufficiency of the evidence.

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[58] https://www.aa.com.tr/en/economy/turkey-bank-asyas-banking-license-cancelled/613864

[59] BHRC notes the Venice Commission Observations (supra, at para 121): "The Turkish authorities themselves do not deny that for many years official structures of the State collaborated with the associations and projects affiliated with Mr Gülen. Given the scale of the network and its presence in all spheres of public, social and economic life, there must have been thousands of people who entered into contact with the network, who supported its activities or even performed certain tasks on its behalf, without, at the same time, being aware of a "hidden face" of this organisation."

97) At the closing stages, the Defendants and their lawyers made lengthy statements and summaries relating to the indictment, allegations and evidence against them. This included stating their position on the additional evidence cited in the Final Opinion which had not been raised with them previously. Neither the Prosecutor nor the Judges asked them any questions about the assertions made in relation to the new evidence.

98) BHRC observes that the paucity of the Prosecutor's evidence, relying as it does on the most tangential and weak association evidence, raises the likely inference that there is no prima facie case against these Defendants and leading to the likely conclusion that these charges should never have been brought at all.

99) Accordingly, in light of the various and grave deficiencies highlighted above, BHRC considers it is likely that there has been a violation of Article 6(3) ECHR and Article 14(3) ICCPR.

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

100) 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.

101) 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.

102) 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:

103) As indicated above, many of the Defendants did not know the allegations against them, upon or subsequent to arrest. Moreover, they were deprived access to a lawyer at the early stages of their case. Even though they were later apprised of the general nature of the allegations in the indictment, the Defendants did not know what case they had to meet. Indeed, it appears as though they were left to divine the substance of the case against each of them from the lengthy indictment itself. There is a lack of clarity as to whether they were even provided with the extensive additional appendix material which the Prosecutor states was available from the outset, and if so, when. At any rate, the Defendants would have had to search themselves through mountains of documents to work out what related to which charge, which Defendant and from where it purported to come.

104) At least some of the Defendants in detention experienced considerably delays in receiving the material even after the Prosecutor's Final Opinion. One Defendant, Ali Bulaç, cited additional delays because his reading glasses were broken and it took the prison authorities a further period of about three weeks before they could be fixed. In that time, he had no access to the extensive material produced on the compact disc which in any event required to be read on the very limited time available on the prison computers.

105) In any event, it is abundantly clear that the Defendants did not know either the case at all or the full case against them until the receipt of the Prosecutor's Final Opinion (and subsequent even to that, the Supplementary Opinion), by which time their evidence was complete and the Prosecutor had closed his case. They were therefore dealing with the full extent of the case against them in their closing statements. 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 trial[60]. Equality of arms is an inherent requirement of a fair trial. In these circumstances, it appears as though at least some of the Defendants may have been substantially disadvantaged in the substantive consideration and presentation of their defence. BHRC considers that the right of at least some of the Defendants to properly prepare their defence appears to have been seriously prejudiced and accordingly, there is likely to have been a violation of Article 6(3) ECHR and Article 14(3) ICCPR.

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

E. The Presumption of Innocence

Article 14(2) ICCPR

"Everyone charged with a criminal offence shall be presumed innocent until proven guilty according to law."

Article 6(2) ECHR

"Everyone charged with a criminal offence shall be presumed innocent until proven guilty according to law."

106) The principle of the presumption of innocence requires that a court should not start with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution, and any doubt should benefit the accused. It is for the prosecution to inform the accused of the case that will be made against him, so that he may prepare and present his defence accordingly, and to adduce evidence sufficient to convict him[61]. The presumption of innocence will be infringed where the burden of proof is shifted from the prosecution to the defence[62].

107) A fair criminal trial may be prejudiced by statements made in close connection with those proceedings. The presumption of innocence may be infringed not only by a judge or court but also by other public authorities[63].

Observations and Concerns:

108) A number of public statements have been made which give serious cause for concern.

109) Following the judgments from the ECtHR in Alpay and Altan's cases, Prime Minister Binali Yildirim stated: "*Whether we like the Constitutional Court's ruling or not, the authority that will make the right call is the first instance court,*" and "*Whichever court it is that is making the decision, our expectation from them is to not make decisions that will hinder the battle against FETO*."[64] Deputy Prime Minister Bekir Bozdag (and former Minister of Justice) wrote, on Twitter[65], in respect of the same

[61] Barberà, Messegué and Jabardo v. Spain,A/146, 6 December 1988 § 77; Janosevic v. Sweden, App No34619/97, at § 97

[62] Telfner v. Austria, App No.33501/96, 20 March 2001, at § 15

[63] Allenet de Ribemont v. France, A/308, 10 February 1995, at § 36; Daktaras v. Lithuania, supra, § 42; Petyo Petkov v. Bulgaria, App No. 32130/03, 7 January 2010, at § 91

[64] https://www.reuters.com/article/us-turkey-security-journalists/turkey-says-local-court-to-evaluate-ruling-on-jailed-journalists-idUSKBN1F10F0

[65] http://www.cumhuriyet.com.tr/haber/siyaset/903399/Bekir_Bozdag_dan_AYM_kararina_tepki__Anayasa_Mahkemesi_temyiz_mahkemesi_degildir.html

decisions: "*When ruling on individual applications, the Constitutional Court... cannot act like a super appeals court and cannot make rulings like such courts*," and with reference to the Alpay and Altan decisions, "*The Constitutional Court has overstepped the limit set out in the constitution and the laws*."

110) Further statements in a similar vein, including reportedly saying that the Constitutional Court had made a decision on acquittal which it was not permitted to do, were reported on different news portals[66].

111) These statements, coming from the most senior government officials, cause serious concern that the trial will be prejudiced by inappropriate public and state pressure on the authorities, and are capable of creating the impression that the lower courts will or might succumb to such pressure in their decisions both on detention and conviction. Accordingly, it is likely that there has been a violation of Article 6(2) ECHR and Article 14(2) ICCPR.

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."

112) 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

66 http://www.hurriyetdailynews.com/constitutional-court-exceeded-limits-turkish-deputy-pm-says-125715

principle, be conducted orally and publicly, in order to ensure the maximum amount of transparency.

113) 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".[67]

Observations and Conclusions:

114) 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 Europe[68], BHRC notes that the physical arrangements for the June hearing of the trial were very difficult for family members, consulate officials, international legal observers, NGOs and journalists to observe.

115) The trial was listed in a court that could accommodate only about 30 people in its public gallery. However, given that there were 11 Defendants, four of whom were in detention, there were many family members in attendance. There was also public interest in the hearing and observers, consular officials and journalists were in attendance. In a hot courtroom, people were sitting either two to a seat, on the floor or were not able to come in at all. 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 was unexplained, given that a larger courtroom was made available for the May hearing.

116) It is not clear to BHRC how many individuals were ultimately unable to enter the courtroom. Accordingly, BHRC cannot conclude that there has been a violation of Article 6(1) ECHR and Article 14(1) ICCPR; however, it emphasises that should individuals have been excluded from the gallery in circumstances where it was

[67] Van Meurs v the Netherlands, UN Human Rights Committee Communication 215/1986.
[68] Istanbul Çağlayan Justice Palace

reasonably foreseeable that a large courtroom would be required (and where it had been provided before), such a breach may have occurred.

G. Pre-trial detention

Article 9 ICCPR

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

Article 5 ECHR (as material)
1. Everyone has the has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law…

…

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;…

2. Everyone who is arrested shall be informed promptly, at the time of arrest, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial,

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

117) The right to liberty and security is of the highest importance in a "democratic society" within the meaning of the Convention[69]. Detention pursuant to Article 5(1)(c) must be a proportionate measure to achieve the stated aim[70], and it is for the authorities to demonstrate that detention is necessary.

118) Pursuant to Article 5(1), the "reasonableness" of the suspicion on which an arrest must be based forms an essential part of the safeguard laid down in Article 5(1)(c). Having a reasonable suspicion presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence. What may be regarded as "reasonable" will depend upon all the circumstances[71]. However, the ECtHR has held that the exigencies of dealing with terrorism does not justify stretching the meaning of 'reasonableness' such that the effectiveness of Article 5(1)(c) is impaired[72].

119) Article 5(2) contains the basic safeguard that any person arrested should know why he is being deprived of his liberty and so forms an integral part of the protection afforded by Article 5[73]. Where a person has been informed of the reasons for his arrest or detention, he may, if he sees fit, apply to a court to challenge the lawfulness of his detention in accordance with Article 5(4)[74].

120) Any person who is entitled to take proceedings to have the lawfulness of his detention decided speedily cannot make effective use of that right unless he is promptly and adequately informed of the reasons why he has been deprived of his liberty[75].

121) Everyone detained shall be entitled to trial within "a reasonable time" or to release pending trial. Pre-trial detention should not be the general rule and it should be used in criminal proceedings only where necessary and as a last resort[76]. It should be used the shortest possible time[77], when required to meet the needs of justice, or of the investigation of the alleged offence or in order to protect society and the

[69] Medvedyev and Others v. France [GC], App No 3394/03, 29 March 2010, at § 76; Ladent v. Poland, App No 211036/03, 18 March 2008, at § 45.
[70] Ladent v Poland, ibid, at §55-6.
[71] See Alpay v Turkey, para 103, supra: See also, Fox, Campbell and Hartley v. the United Kingdom, 30 August 1990, § 32, Series A/182; O'Hara v. the United Kingdom, App no. 37555/97, § 34,; Korkmaz and Others v. Turkey, App no. 35979/97, § 24, 21 March 2006; Süleyman Erdem v. Turkey, no.49574/99, § 37, 19 September 2006; and Çiçek v. Turkey (dec.), no. 72774/10, § 62, 3 March 2015
[72] O'Hara v UK, App No. 37555/97, at § 35,
[73] Khlaifia and Others v. Italy [GC], App Np 16483//12, 15 December 2016, at § 115
[74] Fox, Campbell and Hartley v. the United Kingdom, App Npo 12244/86, 16 June 1986, at §40; Čonka v. Belgium, App No 51564/99, 5 February 2002, at §50
[75] Van der Leer v the Netherlands, A/170, 21 February 1990, at §28; Shamayev and Others v Georgia and Russia, App No 36378/02, 12 April 2005, at §41.
[76] Rule 6.1 of the United Nations Standard Minimum Rules for Non-Custodial Measures, "Tokyo Rules".
[77] Tase v Romania, App No 29761/96, 10 June 2008, at § 40, Idalov v Russia, App Np 5826/03, 22 May 2012, at § 140.

victim. Pre-trial detention should be the exception, and release, which may be subject to relevant conditions, should be granted, except in situations where it is likely that the accused would abscond, destroy evidence, influence witnesses or flee from the jurisdiction of the State[78]. Quasi-automatic extension of pre-trial detention violates Article 5[79]. The burden of proof remains on the authorities to demonstrate the persistence of reasons justifying continued pre-trial detention[80].

122) However, even in such circumstances, the risk of such dangers must be properly assessed and explained by the court without blanket statements or resort to abstract, general or stereotyped reasoning[81]. Further, the court must assess properly what other measures, short of detention, could address any of the risks posed. Detention must not be arbitrary. "Arbitrariness" has been defined to include an element of inappropriateness, injustice, lack of predictability and lack of due process of law[82]. Where trial does not proceed in a reasonable time, continuing detention must be reviewed by a judge and assessed in terms of its length and continuing necessity. What constitutes 'reasonable time' is a matter of assessment for each particular case"[83].

123) The right to a fair trial also incorporates a reasoned decision from the judge, which must be provided in respect of any refusal to release an individual from detention. There must be a right to appeal to a higher judicial or competent authority where an application for release is refused. The right to challenge the lawfulness of detention before a tribunal, court or judge is a non-derogable right which is crucial for protecting the right to liberty and preventing arbitrary detention.

124) The Court must examine all the circumstances arguing for and against the existence of a genuine requirement of public interest justifying, with due regard to the principle of the presumption of innocence, a departure from the rule of respect for individual liberty and set these out in their decisions on the applications for release. In remand cases, since the persistence of a reasonable suspicion that the accused person has committed an offence is a condition *sine qua non* for the lawfulness of the continued detention, the detainee must be given an opportunity effectively to challenge the basis of the allegations against him. "Where such grounds are 'relevant' and 'sufficient', the Court must also ascertain whether the competent national authorities displayed 'special diligence' in the conduct of the

[78] Communication No. 526/1993, M. and B. Hill v Spain (Views adopted on 2 April 1997), UN doc. GAOR, A/52/40 (vol. II), page 17, para. 12.3.
[79] Tase v Romania, ibid, at § 40.
[80] Bykov v Russia, App Np. 4378/02, 10 March 2009, at § 64.
[81] Merabishvili v Georgia, App No 72508/13, at § 222.
[82] Human Rights Committee, Views of 2 April 1997, Michael and Brian Hill v Spain, Communication No. 526/1993, para. 12.3.
[83] Communication No. 336/1988, N. Fillastre v Bolivia (Views adopted on 5 November 1991), in UN doc. GAOR, A/47/40, page 306, para. 6.5.

proceedings. ..."[84] Even in the most serious cases, the existence of a strong suspicion of the involvement of the person concerned, while constituting a relevant factor, cannot alone justify a long period of pre-trial detention[85].

125) Where there is an alleged danger of absconding, the domestic courts must explain why there is a danger of absconding and not simply confirm the detention in "an identical, not to say stereotyped, form of words, without in any way explaining why there was a danger of absconding" and why they have not sought to "counter it by, for instance, requiring the lodging of a security and placing him under court supervision".[86] When the only remaining reason for continued detention is the fear that the accused will abscond and thereby subsequently avoid appearing for trial, his release pending trial must be ordered if it is possible to obtain from him guarantees that will ensure such appearance[87].

126) Even if certain alleged offences may by their nature be said to endanger the public order, capable of justifying pre-trial detention, detention will continue to be legitimate only provided that it is based on facts capable of showing that the accused's release would actually prejudice public order.[88]

127) Equality of arms is not ensured if the applicant, or his counsel, is denied access to those documents in the investigation file which are essential in order effectively to challenge the lawfulness of his detention[89].

128) The absence or lack of reasoning in detention orders is one of the elements taken into account by the Court when assessing the lawfulness of detention under Article 5(1). Thus, the absence of any grounds given by the judicial authorities in their decisions authorising detention for a prolonged period of time may be incompatible with the principle of protection from arbitrariness enshrined in Article 5(1)[90].

Observations and Conclusions:

129) Most of the Defendants state that they first became aware that they were to be arrested by the provision of a list which was made public. Some of them voluntarily

[84] Assenov and Others v. Bulgaria, 28 October 1998, Report 1998-VIII, page 3300, para 154.
[85] Van der Tang v. Spain, 13 July 1995, A/321, para 63; Dereci v Turkey, App Np 77845/01, 24 May 2005, at § 38.

[86] Tomasi v France, 27 August 1992, A/241-A, § 38.
[87] Wemhoff Case v the Federal Republic of Germany, 27 June 1968, Series A/7, § 15. See also Lakatos v. Hungary App No 21786/15), 26 June 2018.

[88] Tomasi v France, 27 August 1992, A/241-A, at § 91.
[89] Ovsjannikov v Estonia, para 72; Fodale v Italy, at § 41; Korneykova . Ukraine, at § 6.
[90] Stašaitis v Lithuania, App No 47679/99, 21 March 2002, at §§ 66-67.

presented themselves at the police station expecting to be cleared of any suspected wrongdoing. Whilst some were taken into police custody and then released when they appeared before a judge, others were then taken into pre-trial detention after appearing before a judge. Some of them were released over intervals since that date. At least one Defendant, Cengiz, states that at the time of his arrest, he simply did not know what he was alleged to have done. That is supported by the fact that, other than his name and the charge on the face of the indictment, there are no allegations against him set out in it. It was only by way of the Prosecutor's Final Opinion that he understood the case he was required to meet.

130) BHRC has not been able to ascertain the factual detail for each Defendant as to their state of knowledge of the allegations against them at the point of arrest and/or in the early months following arrest and detention. However, since in the majority of cases, the basis of the charges was not even clear on the face of the indictment (and relying heavily on material used in the Final Opinion), considering the paucity of the evidence against them and the likelihood that the charges are politically motivated, and considering the assessment made by both the TCC (and consequently the ECtHR) in Alpay's case that the investigating authorities had been unable to demonstrate any factual basis that might indicate that the applicant had been acting in accordance with the aims of FETÖ/PDY, it is very likely that there have been multiple violations of Article 5 ECHR.

131) BHRC notes that the ECtHR strongly disapproved the Istanbul Assize Court's decision not to release Alpay from pre-trial detention following the TCC's judgement and found that it constituted a violation of Article 5(1): "*For another court to call into question the powers conferred on a constitutional court to give final and binding judgments on individual applications runs counter to the fundamental principles of the rule of law and legal certainty."*[91]

132) BHRC notes the following observations of the ECtHR in *Alpay v Turkey*[92]*:*

> *"The Court considers that criticism of governments and publication of information regarded by a country's leaders as endangering national interests should not attract criminal charges for particularly serious offences such as belonging to or assisting a terrorist organisation, attempting to overthrow the government or the constitutional order or disseminating terrorist propaganda. Moreover, even where such serious charges have been brought, pre-trial detention should only be used as an exceptional measure of last resort when all other measures have proved incapable of fully guaranteeing the proper conduct of proceedings. Should this not be the case, the national courts' interpretation cannot be regarded as acceptable.*

[91] Alpay v Turkey, at § 118.
[92] Alpay v Turkey, at § § 181-2.

The Court further notes that the pre-trial detention of anyone expressing critical views produces a range of adverse effects, both for the detainees themselves and for society as a whole, since the imposition of a measure entailing deprivation of liberty, as in the present case, will inevitably have a chilling effect on freedom of expression by intimidating civil society and silencing dissenting voices (see, to similar effect, paragraph 140 of the Constitutional Court's judgment). The Court further notes that a chilling effect of this kind may be produced even when the detainee is subsequently acquitted."

133) There are four Defendants who remain in detention. All of them are over 50, whilst two are in their 60s and cite failing health and weight loss in prison. The reasons for the decision not to release them on 11 May and/or 8 June are imprecise and unclear. On 8 June, a majority of the Court decided not to release them. The dissenting judgment, from Judge Abdullah Ok, stated that on the basis of equality of treatment with Ali Bulaç, who had been released in May 2018, all of the Defendants should have been released pending the verdict.

134) Given the paucity of evidence against all of the Defendants, and the apparent absence of even a prima facie case, the unlikelihood that any of the Defendants will abscond given their age, circumstances and health conditions and/or the failure to consider alternative provisions such as house arrest, BHRC considers that no adequate justification for the continued deprivation of liberty of these Defendants at Silivri prison has been shown by the Prosecutor or by the Court in its reasoning. Accordingly, BHRC concludes that there have been likely and continuing violations of Art 5.

H. 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…"

135) Freedom of expression is protected in Turkish law: Article 26 of the Constitution[93], and under Turkey's international obligations: Article 19 of the ICCPR and Article10, ECHR. In addition, Article 148 of the Constitution enables reliance on ECHR rights in the Constitutional Court.

136) 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. ECtHR and HRC case law indicates that permissible restrictions on freedom of expression are strictly construed and limited[94].

137) 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 ICCPR[95]. 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 ECHR and 5 ICCPR further prohibit limitations applied for an ulterior motive. Cases where the ECtHR has 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 government[96].

138) A journalist is subject to the same criminal laws as anyone else, however, his/her work will attract important safeguards, which protect him/her from prosecution: journalists are afforded substantial protection by Article 10 ECHR 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 journalism[97]. 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 about the issues raised by a particular circumstance is completely different[98]. 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 information[99].

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[93] https://global.tbmm.gov.tr/docs/constitution_en.pdf
[94] See Altan v Turkey and Alpay v Turkey, supra. See also *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].
[95] *HRC General Comment 34(102)* at § 21
[96] *Tymoshenko v Ukraine [2014] 58 EHRR 3,* and *Ilgar Mammadov v Azerbaijan, No. 15172/13, at § § 137-143*
[97] *Radio France, supra,* at §*37*
[98] *Erdogdu v Turkey [2002] 34 EHRR 50, § § 51-73*
[99] *Handyside v UK (1979-80) 1 EHRR 737* at *[49], Axel Springer AG v Germany (2012) 55 EHRR 6* at § *79*

Observations and Concerns:

139) 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, and that forms BHRC's own observation, having now conducted three sets of journalist trial observations in Turkey since the attempted coup. The repeated assertion from Defendants and their lawyers 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.

140) BHRC notes the findings of the ECtHR in Alpay's case:

> ..*Where the views expressed do not constitute incitement to violence – in other words, unless they advocate recourse to violent actions or bloody revenge, justify the commission of terrorist acts in pursuit of their supporters' goals and can be interpreted as likely to encourage violence by instilling deep-seated and irrational hatred towards specified individuals – the Contracting States cannot restrict the right of the public to be informed of them, even with reference to the aims set out in Article 10 § 2, namely the protection of territorial integrity or national security or the prevention of disorder or crime"*[100].

141) In the instant case, the indictment does not indicate that there is evidence of activity which was intended to aid the coup or that the Defendants were members of terrorist organisations. In respect of the reduced charges for four Defendants, it does not indicate how such opinions (whether orally, written or on social media) amount to terrorist propaganda. Instead, the prosecution relies on broad assertions that opinion pieces written by the Defendants (and in some cases social media shares) in fact assisted the activities of the alleged plotters. In short, there is heavy reliance on the weakest of association evidence, namely that because these journalists worked for or produced opinion for *Zaman*, purportedly in line with *Zaman*'s editorial policy, that constitutes sufficient evidence of association and guilt. That falls very far short of the standard required to interfere with free expression.

142) 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) ECHR but as a campaign against journalists critical of the Government and the President, designed to remove all opposition debate and comment: the lifeblood of a functioning democracy.

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[100] See § § 179-182 *Şahin Alpay v Turkey*, and see further § 180: "the existence of a "public emergency threatening the life of the nation" must not serve as a pretext for limiting freedom of political debate, which is at the very core of the concept of a democratic society."

143) 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 ulterior purpose, and therefore also may amount to an abuse of power contrary to Article 18 ECHR.

Conclusions

144) BHRC expresses serious concern that the *Zaman* trial raises multiple potential and likely violations of Articles 5, 6, 10 ECHR, and Turkey's parallel obligations under the ICCPR.

145) The charges, and the manner in which the attendant evidence has been presented and pursued at trial, gives rise to a serious inference that there is no prima facie case in law against these Defendants. That itself gives rise to the potential conclusion that such charges are manifestly ill-founded, that they have been improperly brought and pursued by the Prosecutor's Office, potentially based upon improper motive, contrary to Article 18 ECHR, and that Defendants so charged have been arbitrarily and unlawfully deprived of their liberty.

146) BHRC recalls that the Turkish Constitutional Court has ruled already that the evidence relied upon in the case of Şahin Alpay, is insufficient to demonstrate any factual basis that might indicate that the applicant had been acting in accordance with the aims of FETÖ/PDY, and moreover, that the fact of writing for *Zaman* was not enough to infer that he knew of the organisation's goals to overthrow the Government.

147) Placing this in the context of the very tight and broad clampdown on civil society, journalists, lawyers, academics and judges that has taken place since the coup attempt, BHRC observes that it is indeed plausible that these charges are politically motivated. At the very least, they represent a very grave incursion into the rights of freedom of expression and freedom of the press. BHRC recalls that recent judgments of the Turkish Constitutional Court and the European Court of Human Rights have warned that the prosecution and detention of journalists for their views can create a chilling effect on freedom of expression, which is a cornerstone principle within a functioning democracy.

148) The paucity of the evidence also raises the very real concern that the Defendants have been arbitrarily deprived of their liberty, at differing stages over the course of the last two years. Four Defendants remain in pre-trial detention. In light of the decision to release Ali Bulaç on 11 May 2018, there appears to be no good reason why the remaining four Defendants, as frail and in ill-health as they appeared in

court to be, should not also have been released on the same grounds. The dissenting opinion of the Court appeared also to be of that persuasion. No proper reasoned decision was provided by the majority of the Court as to why they should remain in detention, nor why other alternative, lesser measures, such as house arrest were not suitable.

149) 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 detained. 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.

150) BHRC therefore urges the Turkish authorities to consider both whether the continued prosecutions of these Defendants, and the continued detention of four of them, are in the public interest and should be pursued. BHRC also calls on the Turkish authorities to ensure that all lawyers in Turkey are provided with the protection and guarantees required to carry out their functions as provided for in the UN Basic Principles on the Role of Lawyers.

151) Further, BHRC urges the authorities, and in particular the Court, to honour their constitutional and international commitments to the rule of law and fundamental rights and protections, including by way of commitment to an independent and impartial judiciary and to the protection and preservation of freedom of expression.

Appendix One

The list of Defendants to be heard in the final hearing and final charges are as follows:

	Name	Charges in the Prosecution's Final Opinion	Procedural articles	Supplementary Prosecution Opinion
1	Ahmet Turan Alkan	Membership of armed terrorist organisation (Turkish Criminal Code (TCC); 314/2) Attempting to overthrow the constitutional order (TCC; 309/1)	TCC 53, 58-9, 61 Law 3713; 5/1	
2	Ali Bulaç	Membership of an armed terrorist organisation (TCC; 314/2) Attempting to overthrow the constitutional order (TCC; 309/1)	TCC53, 58-9, 61 Law 3713; 5/1	
3	İbrahim Karayeğen	Membership of an armed terrorist organisation (TCC; 314/2) Attempting to overthrow the constitutional order (TCC; 309/1)	TCC53, 58-9, 61 Law 3713; 5/1	Leading in a terrorist organisation (TCC; 314/1) Law 3713; 5/1
4	İhsan Dağı	Membership of an armed terrorist organisation (TCC; 314/2) Attempting to overthrow the constitutional order (TCC; 309/1)	TCC53, 58-9, 61 Law 3713; 5/1	Terrorism Propaganda (Law 3713; 7/2)
5	Lalezar Sarıibrahimoğlu (Kemal)	Aiding an armed terrorist organisation without being a member (TCC; 220/7 refers to TCC; 314/2)	TCC 53 Law 3713; 5/1	

6	Mehmet Özdemir	Membership of an armed terrorist organisation (TCC; 314/2) Attempting to overthrow the constitutional order (TCC; 309/1)	TCC53, 58-9, Law 3713; 5/1	Leading in a terrorist organisation (TCC; 314/1) Law 3713; 5/1
7	Mustafa Ünal	Membership of an armed terrorist organisation (TCC; 314/2) Attempting to overthrow the constitutional order (TCC; 309/1)	TCC53, 58-9, 61 Law 3713; 5/1	
8	Mümtazer Türköne	Membership of an armed terrorist organisation (TCC; 314/2) Attempting to overthrow the constitutional order (TCC; 309/1)	TCC53, 58-9, 61 Law 3713; 5/1	
9	Nuriye Ural (Akman)	Aiding an armed terrorist organisation without being a member (TCC; 220/7 refers to TCC; 314/2)	Law 3713; 5/1 TCC 53	
10	Orhan Kemal Cengiz	Membership of a terrorist organisation (TCC; 314/2) Attempting to overthrow the constitutional order (TCC; 309/1)	TCC53, 58-9, 61 Law 3713; 5/1	Terrorism Propaganda (Law 3713; 7/2) TCC 43/1, 53
11	Şahin Alpay	Membership of a terrorist organisation (TCC; 314/2) Attempting to overthrow the constitutional order (TCC; 309/1)	TCC53, 58-9, 61 Law 3713; 5/1	

Appendix Two

Establishing Organisations for the Purpose of Committing Crimes
Article 220

(1) Any person who establishes or manages an organisation for the purposes of committing offences proscribed by law shall be sentenced to imprisonment for a term of two to six years provided the structure of the organisation, number of members and equipment and supplies are sufficient to commit the offences intended. However, a minimum number of three persons is required for the existence of an organisation.

(2) Any person who becomes a member of an organisation established to commit offences shall be sentenced to a penalty of imprisonment for a term of one to three years.

(3) If the organisation is armed, the penalty stated in aforementioned paragraphs will be increased from one fourth to one half.

(4) If an offence is committed in the course of the organisation's activities, then an additional penalty shall be imposed for such offences.

(5) Any leaders of such organisations shall also be sentenced as if they were the offenders in respect of any offence committed in the course of the organisation's activities.

(6) **(Amended on 2/7/2012 - By Article 85 of the Law no. 6352)** Any person who commits an offence on behalf of an organisation, although he is not a member of that organisation, shall also be sentenced for the offence of being a member of that organisation. The sentence to be imposed for being a member of that organization may be decreased by half. **(Additional Sentence: 11/4/2013 - By Article 11 of the Law no. 6459)** This provision shall only be applied in respect of armed organizations.

(7) **(Amended on 2/7/2012 - By Article 85 of the Law no. 6352)** Any person who aids and abets an organisation knowingly and willingly, although he does not belong to the structure of that organisation, shall also be sentenced for the offence of being a member of that organisation. The sentence to be imposed for being a member of that organization may be decreased by one-third according to the assistance provided.

(8) A person who makes propaganda for an organization in a manner which would legitimize or praise the terror organization's methods including force, violence or threats or in a manner which would incite use of these methods shall be sentenced to a penalty of imprisonment for a term of one to three years. If the said crime is committed through the press or broadcasting the penalty to be given shall be increased by half.

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