



TRIAL OBSERVATION REPORT

Pre-trial hearing of 43 Turkish lawyers,
Istanbul

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Bar Human Rights Committee

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

BHRC aims:

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

As part of its mandate, BHRC undertakes legal observation missions to monitor proceedings where there are reasons to believe that the judiciary may not be independent or impartial and/or the defendant might otherwise be denied the right to a fair trial.

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.

Introduction

This observation report is of the twelfth interim hearing in a trial of 46 defendants, including 43 lawyers. The defendant lawyers were arrested in November 2011. The charges against them allege that they acted as “mediators” by providing members of an illegal organisation with “information and direction” from Abdullah Öcalan, and that they were thus involved in the “strategy and management” of an illegal organisation, namely the Kurdisan Workers’ Party (PKK).¹ They deny all charges.

This trial is linked to a series of other trials which have taken place in Turkey in recent years, relating to the Kurdish-Turkish conflict in South East Turkey. Human Rights Watch estimate that several thousand Kurdish activists, whom the government claim are members of the Koma Civaken Kurdistan (KCK²), have been arrested and stood or are standing trial, accused of terrorist-related activities.³

This report should be read in conjunction with reports authored for the Bar Human Rights Committee of England and Wales by Melanie Gingell on 3 January 2013⁴ and 28 March 2013.⁵ The observation of these previous reports and of reports provided by various other international legal observers is that the trial is of a highly political nature and that it contains procedural irregularities which may lead to breaches of principles on the role of lawyers and internationally recognised fair trial standards, and specifically to Articles 5 and 6 of the European Convention on Human Rights.

¹ Trial Observation Report, Hearing of 3 January 2013, Tony Fisher, <https://fig.app.box.com/s/lrxme6ra0nmfq009rnlo5czjimttka05/1/7067362325/15908485731/1>

² Union of Communities of Kurdistan (“KCK”), an organisation designated as illegal in Turkey

³ HRW, World Report 2013: Turkey, Events of 2012, Human Rights Watch, <https://www.hrw.org/world-report/2013/country-chapters/turkey>

⁴ Available at http://www.barhumanrights.org.uk/sites/default/files/documents/news/report_on_bhrc_hearing_observation_-turkey.pdf

⁵ Available at http://www.barhumanrights.org.uk/sites/default/files/documents/news/report_on_bhrc_hearing_observation_-turkey.pdf

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Ms Jones was assisted during her visit by members of the İstanbul Bar Association (İBA), who provided her with background material and provided translation during the hearing, organised the press conference that followed, and a meeting following these events with a member of the board of the İstanbul Bar Association (IBA).

Background

This was the 12th interim hearing in the case.

Previous hearings in the case were observed by Ms. Jones and/or by lawyers from a number of different countries, including Canada, France, Germany, Greece the Netherlands, and the United Kingdom. Particular attention is drawn the statement of the delegation of international lawyers attending the hearing on 6 November 2012,⁶ also attended by Ms. Jones.

The first hearing on 20 July 2012 was held in the Special Istanbul Criminal Court in Istanbul. The second hearing on 6 November 2016 and all subsequent hearings in 2013 were heard in the Istanbul 16th Specialized Heavy Penal Court located in Silivri Prison complex in the town of Silivri, approximately two hours by car from central Istanbul. The hearings dealt *inter alia* with bail applications. Some but not all defendants were released on bail, with no reasons being given for the granting or refusal of bail in any individual case.⁷

On 21 February 2014, the Istanbul 16th Specialized Heavy Penal Court was abolished by the Turkish Parliament. All remaining defendants in custody were released on bail on 18 March 2014, following a petition submitted to the Istanbul 1st Heavy Penal Court.⁸ The subsequent hearings in the case on 13 November 2014, 7 May 2015, and 17 March 2016 all took place at Çağlayan Justice Palace in the district of Çağlayan in central İstanbul.

On 16 March 2016, a further nine lawyers from the Istanbul Bar Association were arrested in dawn raids, namely İrfan Arasan, Ayşe Acınlı, Hüseyin Boğatekin, Şefik Çelik, Tamer Doğan, Ayşe Gösterislioğlu, Mustafa Ruzgar, and Ramazan Demir. Some of the lawyers had been representing defendant lawyers in the above proceedings. The reason for the arrests was unclear, save that they were on suspicion of terrorism. We now know that they have been charged with “belonging to a criminal organisation”, namely the PKK / KCK.

⁶ Available at <http://kurdistantribune.com/2012/deeply-concerned-joint-statement-by-internationalobservers-of-kck-lawyers-trial/>

⁷ This is referred to in the reports of Tony Fisher and Melanie Gingell for each of the hearings they attended.

⁸ Trial Observation Report, Hearing of 14th November 2014, Tony Fisher, <https://fig.app.box.com/s/lrxme6ra0nmfq009rnlo5czjimttka05/1/7067362325/57114246961/1>

The hearing

The hearing took place at the 17th Heavy Penal Court at Çağlayan Justice Palace in Çağlayan, central Istanbul on 17 March 2016, the morning after the arrest of a number of the defence team. The defence had sought to challenge the constitutionality of the proceedings, on the basis of the abolishment of the Istanbul 16th Specialized Heavy Penal Court, which had hitherto been seized of the case. Given the arrest of a number of defence team lawyers, this argument was not heard.

The hearing lasted less than half an hour. A defence lawyer stood and made submissions addressing difficulties facing the Diyarbakir Bar Association in general and the arrest of nine of its members the previous day. The lawyer asserted that “These are historic days, for good or ill,” stating that the AKP (the ruling Justice and Development Party) government was “moving towards tyranny” and asserting that over the last six years no improvements in the judicial system had been made.

The judge intervened to ask counsel to come to the point of the hearing under consideration. Counsel responded that he intended to make political submissions. He asserted that the lawyers should not have been arrested and detained, given that they would have attended voluntarily at a police station to answer inquiries if requested. He then said that all dictatorships eventually come to an end, and added that despite the detention of their colleagues, the remaining defence team would stand firm. He announced that the defence team was leaving the court in protest at these developments.

The defence lawyers then rose and left the court. The judge adjourned proceedings until 28 June 2016, and requested a closing submissions from the prosecutor to be made on that date.

Events following the hearing

A press statement on behalf of the international observers in attendance was organised for 1:00 pm, following the hearing. The French delegation prepared a joint French-language statement, and Tony Fisher, observing on behalf of the Law Society of England and Wales, was to deliver a similar statement in English.

The delegation approached the agreed location of the press statement shortly before 1:00 pm. Protesters were already gathered outside of the court, shouting slogans. There was a heavy riot police presence. The crowd around the protesters was very thick and seemed to include members of the press (people holding cameras and microphones were observable at the front). An announcement was made over the loudspeaker, which a colleague from the IBA translated as, “You have been told to leave. If you do not go now, we will be forced to dismiss you.” The international observers then witnessed a baton charge against the protesters. Considerable force was used.

It was therefore decided not to proceed with the press statement. However, BHRC and the Bar Council of England and Wales subsequently released a joint statement condemning the use of riot police against peaceful protestors.⁹

In the days following the hearing, there were significant developments in relation to the nine lawyers arrested on 16 March 2016. On 19 March 2016, following a thirteen-hour hearing of applications for pre-trial release, the 1st Criminal Peace Judgeship released all nine defendants. However, the prosecution appealed to both the 1st and 2nd Criminal Peace Judgeship, without giving notice of this application to any of the defendants or their representatives.

On 21 March 2016, at an ex parte hearing, without notice given to or submissions heard from the defence, the 2nd Criminal Peace Judgeship conducted a brief review of the decision of the 1st Criminal Peace Judgeship and concluded that (a) there was enough evidence of “*belonging to a criminal organisation*” to justify pre-trial detention and (b) that risks of flight and interference with evidence had been established in respect of four of the lawyers, namely Ms Boğatekin, Mr Demir, Ms Acınlı and Ms Gösterislioğlu. They therefore reversed the decision in respect of pre-trial release and issued arrest warrants in respect of four of the lawyers.

Ramazan Demir and Ayşe Acınlı were re-arrested following the decision of the 2nd Criminal Peace Judgeship, released two days later, and re-arrested again on 6 April 2016. The other seven lawyers have not been re-arrested.

The arrest of the defendants in this trial in November 2011, and the arrest of nine lawyers on 16 March 2016, are not isolated incidents, and come in the context of increasing repression of lawyers acting in cases against the Turkish government. On 18 January 2013, fifteen lawyers, of whom twelve were from the Progressive Lawyers’ Association (CHD) were amongst 85 people arrested on terrorism charges. The lawyers concerned were also involved in the defence of some of the defendant lawyers in this trial. Lucy Scott-Moncrieff, the President of the Law Society of England and Wales, wrote personally

⁹ Available at <http://www.barhumanrights.org.uk/bhrc-and-bar-council-express-deep-concern-over-at-tacks-against-lawyers-turkey>

to then-Turkish Prime Minister Erdogan on 8 February 2013 to express her concerns over these arrests.¹⁰ These and the most recent arrests serve to further underline BHRC's concerns that the Turkish authorities are using judicial proceedings on a wide scale as part of a systematic attempt to repress and intimidate lawyers involved in politically sensitive cases, undermining the right to representation. This constitutes a serious violation of the rule of law.

¹⁰ Available at <https://peaceinkurdistancampaign.files.wordpress.com/2013/02/law-soc-letter-to-erdogan.pdf>

Broader political context

The human rights situation in Turkey has been deteriorating rapidly throughout 2015 and 2016. The likelihood of a settled peace agreement between the Turkish government and the Kurdish rights movement has also deteriorated significantly during the course of the trial.

Shortly after the trial's commencement, on 6 December 2012, then-Prime Minister Erdoğan announced that peace talks were taking place between the Turkish government and Abdullah Öcalan directly.¹¹ On 21 March 2013 Öcalan called for a unilateral ceasefire in an announcement timed to coincide with Newroz, the Kurdish New Year. Erdoğan cautiously welcomed this development. The ceasefire was implemented.¹²

Contemporaneously, law 6411 came into force in Turkey on 24 February 2013,¹³ allowing defendants to conduct themselves in court in a language which they feel most comfortable speaking. This had the effect of addressing one of the primary issues of contention in the lawyers' trial, namely, the defendants' request to conduct their defence in Kurdish.¹⁴

Unfortunately, this proved the high water mark of the peace process. In the context of the siege of the Kurdish-held town of Kobane in Syria by the so-called Islamic State group, which lasted from 13 September 2014 to 26 January 2015,¹⁵ armed conflict between the PKK and the Turkish armed forces recommenced on 13 October 2014, when Turkish fighter jets bombed PKK rebels along the Turkish-Iraqi border.¹⁶

A turning point in the Turkish political landscape has been identified as the Gezi Park protest movement of spring 2013, which arguably ushered in the formation of the Peace and Democracy Party (HDP), a coalition of leftist, green, and Kurdish parties. In the general elections in June 2015, the HDP passed the 10% electoral threshold to take up seats in Parliament, winning 12.96% of the vote, 80 seats, thus denying the ruling Justice and Development Party ("AKP") a majority.¹⁷ When the parties were unable to form a coalition agreement, a repeat poll was held on 1 November 2015¹⁸ leading to an AKP

¹¹ Turkish talks offer hope of peace with Kurdish militants, Guardian, 31 December 2012,

<http://www.theguardian.com/world/2012/dec/31/turkish-peace-talks-kurdish-militants-pkk>

¹² Kurdish ceasefire boosts peace process in Turkey, Guardian, 21 March 2013, <http://www.theguardian.com/world/2013/mar/21/kurdish-ceasefire-peace-process-turkey>

¹³ Amending Article 212(4) of the Code of Criminal Procedure

¹⁴ As described in Tony Fisher's reports of hearings on 6 November 2012, and 3 January 2013, and Tony Fisher and Melanie Gingell's reports of the hearing of 28 March 2013, available here:

<https://fig.app.box.com/s/lrxme6ra0nmfq009rnlo5czjimttka05> and here: http://www.barhuman-rights.org.uk/sites/default/files/documents/news/bhrc_hearing_observation_report - turkey_0.pdf

¹⁵ Battle for Kobane: Key events, BBC, 25 June 2015, <http://www.bbc.co.uk/news/world-middle-east-29688108>

¹⁶ Turkish jets bomb PKK rebels near Iraq, BBC, 14 October 2015, <http://www.bbc.co.uk/news/world-europe-29611582>

¹⁷ From Gezi Park to Turkey's Transformed Political Landscape, Buket Türkmen, Open Democracy, 7 July 2015, <https://www.opendemocracy.net/buket-t%C3%BCrkmen/from-gezi-park-to-turkey%E2%80%99s-transformed-political-landscape>

¹⁸ Turkey election 2015: a guide to the parties, polls and electoral system, Guardian, 28 October 2015, <http://www.theguardian.com/news/datablog/2015/oct/28/turkey-election-2015-guide-parties-polls-electoral-system>

majority government.¹⁹

Since the June elections, events in South-East Turkey caused serious human rights concerns. Amnesty International^{20,21} and Human Rights Watch²² are among the organisations that have levelled accusations of collective punishment against the Turkish government in respect of the suffering of primarily Kurdish civilians in towns such as Sur (Diyarbakır) and Cizre, which have been subjected to 24-hour curfews and heavy bombardment by the Turkish military in the context of the escalating conflict with the PKK; the Council of Europe's commissioner for human rights in Turkey has also expressed concerns and called on Turkey to protect the human rights of its civilians.²³

On 28 November 2015, the Turkish human rights lawyer Tahir Elçi was shot and killed during a press conference in Diyarbakır at which he called for an end to the armed conflict between the PKK and the Turkish government, and a resumption of the peace process. Tahir Elçi was the president of the Diyarbakır Bar Association and a towering human rights defender. BHRC put out a joint statement with the Democratic Progress Institute mourning his death.²⁴

Tahir Elçi was also a member of the defence team in the KCK lawyers' trial. He addressed the court on behalf of the defendants at the hearing on 3 January 2013; his submissions are recorded in the reports of Melanie Gingell and Tony Fisher, for BHRC and the Law Society respectively.²⁵ He gave strong submissions requesting the release of the detained defendants on bail, referring to their low risk of absconding and the inordinate length of pre-trial detention.

¹⁹ Turkey election: Erdoğan and AKP return to power with outright majority, Guardian, 2 November 2015, <http://www.theguardian.com/world/2015/nov/01/turkish-election-akp-set-for-majority-with-90-of-vote-counted>

²⁰ Turkey: Onslaught on Kurdish areas putting tens of thousands of lives at risk, Amnesty International, 21 January 2016, <https://www.amnesty.org/en/latest/news/2016/01/turkey-onslaught-on-kurdish-areas-putting-tens-of-thousands-of-lives-at-risk/>

²¹ Turkey: Failure to respond to desperate pleas of seriously injured as deaths mount, Amnesty International, 28 January 2016, <https://www.amnesty.org/en/press-releases/2016/01/turkey-failure-to-respond-to-desperate-pleas-of-seriously-injured-as-deaths-mount/>

²² Turkey: Mounting Security Operation Deaths: Scores of Civilians Among Hundreds Killed in Southeast, Human Rights Watch, 22 December 2015, <https://www.hrw.org/news/2015/12/22/turkey-mounting-security-operation-deaths>

²³ Statement: Turkey should ensure the protection of human rights in the fight against terrorism, Commissioner for Human Rights, Council of Europe, 18 November 2015, <http://www.coe.int/en/web/commissioner/-/turkey-should-ensure-the-protection-of-human-rights-in-the-fight-against-terrorism?inheritRedirect=true&redirect=%2Fen%2Fweb%2Fcommissioner%2Fnews-2015>

²⁴ Available at http://barhumanrights.org.uk/sites/default/files/documents/biblio/bhrc_dpi_statement_re_tahir_elci.pdf

²⁵ Available at <https://fig.app.box.com/s/lrxme6ra0nmfq009rnlo5czjimtt-ka05/1/7067362325/15908485731/1> and https://www.barhumanrights.org.uk/sites/default/files/documents/biblio/report_on_bhrc_hearing_observation_-_turkey.pdf

Concerns

BHRC's fundamental concerns are that this trial is heavily politicised and is based on an unlawful association by the Turkish authorities of lawyers acting in politically-sensitive cases with the aims and objectives of their clients. In this context there is a grave risk that the defendants are being denied due process.

Concerns about intercept and surveillance evidence

There are grave concerns around the evidence being used in this trial.

Some of the evidence on which the charges against the defendant lawyers are based arises out of routine recording of privileged lawyer-client interviews, which is a fundamental breach of lawyer-client confidentiality and a breach of Article 18 of the UN Basic Principles for Lawyers, adopted by Turkey in 1990. According to the charge sheet submitted by the prosecution, they also intend to rely on legally privileged material, evidence obtained through surveillance, and in particular personal conversations between lawyers and their spouses. This would constitute a *prima facie* breach of their Article 8 ECHR right to respect for private and family life, home and correspondence. No reasoned decision has been given at any stage in the proceedings as to the necessity and proportionality of the use of such evidence.

Role of lawyers

It appears that the charges against the defendant lawyers are based on an improper association made by the Turkish authorities of the defendant lawyers with the activities of their client, Abdullah Öcalan. The foundation of the charges and the conduct of the trial raises real concerns that the Turkish authorities are acting in breach of Articles 16, 18, and 22 of the UN Basic Principles on the Role of Lawyers:

16. Governments shall ensure that lawyers:

- a) *are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference;*
- b) *are able to travel and to consult with their clients freely both within their own country and abroad; and*
- c) *shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.*

18. Lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions.

22. Governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential.

Due process

The preliminary hearings in the trial have already spanned almost five years. Pre-trial hearings have continued intermittently, separated sometimes by close to one year. Each lasts for no more than a single day in court, and often for less than an hour. The judge's contributions to the proceedings remain perfunctory. Reasons are rarely given for decisions. In particular, no bail decision since the outset of the trial has been reasoned.

Summary decisions have been given on a number of various issues: the use of Kurdish in the courtroom (prior to the 2014 law), applications for the exclusion of intercept evidence on the basis of alleged breaches of Articles 3, 5.1, 6, and 8 ECHR,²⁶ for summary acquittal on the basis that the trial was fundamentally flawed by unfair procedure²⁷ or on the basis of the abolishment of the "specially empowered" terrorism courts, without any transitional provisions being implemented for ongoing trials.²⁸

There has been no decision in any case, or in general, as to what is to be done about proceedings in progress at the time the court was abolished. This is despite often lengthy submissions from defence lawyers. The duty to give reasons is a check on arbitrary decision-making, the risk of which has been of grave concern since the outset of this trial.

There have also been violations of the Article 6 ECHR right to trial within a reasonable time, or to release pending trial pursuant to Article 5 ECHR. Some of the defendants were held on remand for almost two years, from their initial arrest in April 2012 until 18 March 2014. The excessive length of pre-trial detention is only exacerbated by the failure to give any reasons as to why individuals with professional and family ties in the country, who would not appear to present any elevated risk of flight or interference with the trial, should not have been released at a much earlier stage of proceedings.

These concerns, added to the continued arrest of lawyers in politically sensitive cases, and the deeply worrying reaction of the Turkish police to the press conference intended to be held outside the Çağlayan Justice Palace following the hearing of 17 March 2016, continue to paint an alarming picture of a deeply politicised trial process in which lawyers are being systematically targeted in order to prevent them from representing causes which are unpopular with the current Turkish ruling party. The deteriorating human rights situation in the country, in particular in respect of the Kurdish issue, only serves to exacerbate these concerns. BHRC particularly recalls the fatal shooting of Tahir Elçi in November 2015,²⁹ and shares concerns raised by Amnesty International that no effective investigation will be carried out.³⁰

²⁶ Referred to in Trial Observation Report, Hearing of 3 January 2013, Tony Fisher, <https://fig.app.box.com/s/lrxme6ra0nmfq009rnlo5czjimttka05/1/7067362325/15908485731/1>

²⁷ Referred to in Trial Observation Report, Hearing of 13 November 2014, Tony Fisher, <https://fig.app.box.com/s/lrxme6ra0nmfq009rnlo5czjimttka05/1/7067362325/57114246961/>

²⁸ Referred to in Trial Observation Report, Hearing of 7 May 2015, Tony Fisher, <https://fig.app.box.com/s/lrxme6ra0nmfq009rnlo5czjimttka05/1/7067362325/57114230633/1>

²⁹ Statement: BHRC and DPI deplore shooting of Tahir Elçi, President of the Diyarbakır Bar Association, Turkey, 1 December 2015, http://barhumanrights.org.uk/sites/default/files/documents/biblio/bhrc_dpi_statement_re_tahir_elci.pdf

³⁰ Andrew Gardner, Amnesty International, 30 November 2015, <https://www.amnesty.org/en/latest/news/2015/11/at-the-funeral-of-tahir-elci-a-giant-in-turkeys-human-rights-movement-the-sense-of-loss-is-deafening/>

For the next hearing on 28 June 2016, a prosecution statement was requested. Colleagues from the IBA anticipated that this would involve the prosecution making submissions to the judge on the appropriate outcome of the proceedings, and it may involve conviction or acquittal taking place on that day. However, the hearing was ineffective and no decision was made. The defence team was notified in advance that the hearing would result in another adjournment, and international observers therefore did not attend.

On 15 July 2016 there was an unsuccessful attempted military coup in Turkey. In the weeks since the coup, the AKP government has removed approximately 60,000 state employees from their posts, including teachers, police, clerics, university deans, and members of the judiciary. An estimated 6,500 members of the military, including generals, have been detained,³¹ as well as an estimated 3,000 judges and legal officers.³² Turkey has registered derogations from the European Convention on Human Rights with the Council of Europe.³³ Amnesty International has raised concerns of human rights violations against detainees.³⁴

There is a hearing of the lawyers' trial listed in November but in view of recent events it is unclear to the defence team and to international observers whether it will be effective. The political and legal situation in Turkey is exceedingly difficult in the aftermath of the attempted coup.

The Bar Human Rights Committee remains gravely concerned that this trial will end with numerous unsafe convictions.

³¹ <http://indy100.independent.co.uk/article/erdogan-s-purge-all-the-people-removed-from-their-jobs-in-turkey-since-the-coup--ZJY4h73X8W>

³² <http://www.independent.co.uk/voices/turkey-coup-erdogan-purge-military-judges-criminals-getting-rid-of-secular-a7141556.html>

³³ <http://rightsinfo.org/turkey-derogates-european-convention-human-rights-following-recent-coup-attempt/>

³⁴ <https://t.co/cSdPZis516>